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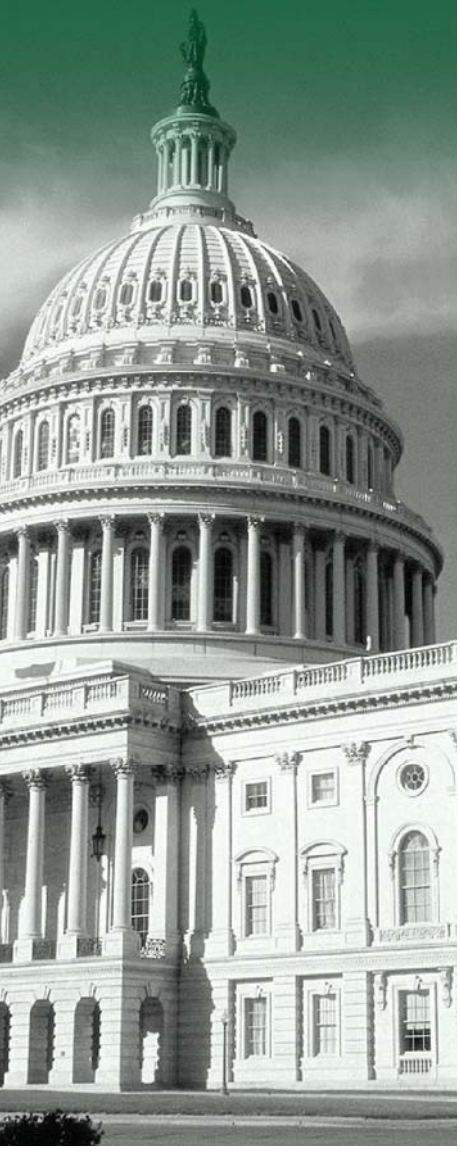
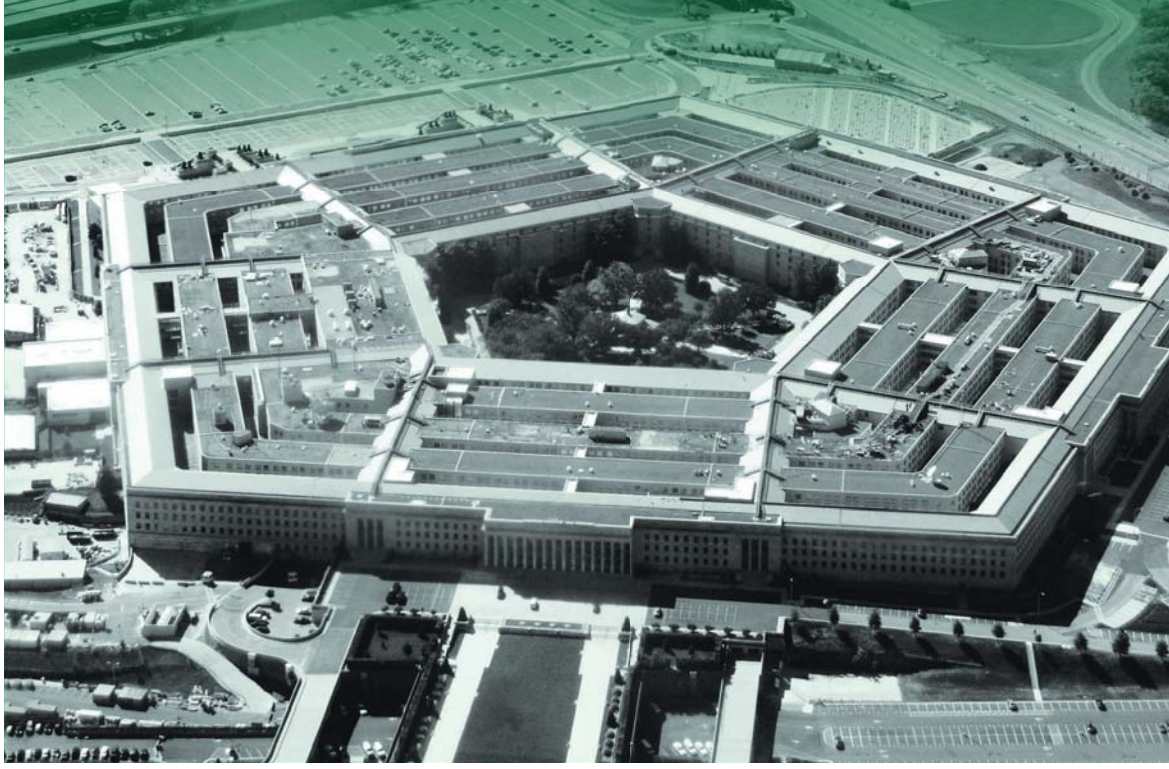
INSPECTOR GENERAL

U.S. Department of Defense

DATE OF REPORT - June 12, 2019



WHISTLEBLOWER REPRISAL INVESTIGATION LIEUTENANT STEVEN SHAW STRIKE FIGHTER SQUADRON ONE ZERO SIX NAVAL AIR STATION OCEANA, VIRGINIA



INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

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WHISTLEBLOWER REPRISAL INVESTIGATION
LIEUTENANT STEVEN SHAW
STRIKE FIGHTER SQUADRON ONE ZERO SIX
NAVAL AIR STATION OCEANA, VIRGINIA

I. EXECUTIVE SUMMARY

We conducted this investigation in response to allegations filed with the DoD Hotline by Lieutenant (LT) Steven Shaw (the Complainant), U.S. Navy (USN), Strike Fighter Squadron One Zero Six (VFA-106) Instructor Pilot (IP), Naval Air Station (NAS) Oceana, Virginia, that the following personnel actions occurred in reprisal for his protected communications to the United States Fleet Forces Command (USFF) Inspector General (IG), the Commander Naval Air Forces Atlantic (CNAL) IG, the Secretary of the Navy Office of Inspector General (NAVINSGEN), the DoD Office of Inspector General (OIG), his chain of command, and a Member of Congress, and for assisting in filing Equal Opportunity (EO) actions under 10 U.S.C. 1034(b).

- [redacted], USN, VFA-106 [redacted], and [redacted], United States Marine Corps (USMC), VFA-106 [redacted] removed his instructional duties.
- [redacted] and [redacted] reassigned the Complainant to a position that was not commensurate with his grade.
- [redacted] threatened the Complainant with disciplinary action.
- [redacted] requested the conduct and scope, [redacted] initiated, and [redacted], USN, [redacted], NAS Oceana, conducted a retaliatory investigation for the primary purpose of punishing, harassing, or ostracizing the Complainant.
- [redacted] issued the Complainant an unfavorable Fitness Report (FITREP).

We determined that the Complainant made 11 protected communications under 10 U.S.C. 1034: one each to the DoD OIG, USFF IG, CNAL IG, and NAVINSGEN; two to a Member of Congress; one to his chain of command; two in assisting in an investigation related to a protected communication; and two by participating in or otherwise assisting in filing an action, and was perceived as a whistleblower under 10 U.S.C. 1034(b).

We determined that [redacted] and [redacted]:

- had knowledge of seven of the Complainant's protected communications;
- perceived that the Complainant had made four additional protected communications by participating in the IG and USFF EO investigations, and believed the Complainant would file additional IG complaints;

And that [redacted]:

- had knowledge of six of the Complainant's protected communications; and
- perceived that the Complainant had made four additional protected communications by participating in the IG and USFF EO investigations, and believed the Complainant would file additional IG complaints.

We substantiated the allegation that [redacted] threatened the Complainant with disciplinary or corrective action; that [redacted] requested the conduct and scope, [redacted] initiated, and [redacted] conducted a retaliatory investigation; and that [redacted] issued the Complainant an unfavorable FITREP in reprisal for the Complainant's protected communication(s), in violation of Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

We did not substantiate the allegation that [redacted] and [redacted] removed the Complainant's instructional duties in reprisal for the Complainant's protected communications.

By a letter dated April 23, 2019, we provided [redacted], [redacted], and [redacted] the opportunity to comment on the preliminary report of investigation.

In [redacted] response, dated April 25, 2019, [redacted] acknowledged receipt of the findings of this investigation and commented that the "Facts, opinions, and conclusions surrounding these events are not necessarily represented as/how [sic] they occurred and any attempt to further clarify would be exceedingly challenging." We carefully considered [redacted] response; however, as [redacted] did not provide any substantive information rebutting the veracity of the findings in the preliminary report of investigation, we did not amend the report or alter our original conclusion.

In [redacted] response, dated May 6, 2019, [redacted] disagreed with our findings and stated that the motive and basis for the VFA-106 command investigation was due to safety concerns, and that VFA-106 leadership took steps to ensure the Complainant was protected from whistleblower reprisal. Additionally, [redacted] stated that [redacted] removed [redacted] recommendation for VFA operational department head from the Complainant's FITREP because the Complainant lacked a sense of urgency to get qualified. We carefully considered [redacted] response; however, as [redacted] did not provide any information that we had not already considered, we did not amend the report or alter our conclusions.

In [redacted]' response, dated May 22, 2019, [redacted] disagreed with our findings, stated that [redacted] conducted a fair and impartial investigation, asserted that the DoD OIG failed to take into account the merits of the VFA-106 command investigation, and claimed that the DoD OIG misrepresented or excluded key evidence that exonerated [redacted] We carefully considered

[redacted] response; however, as [redacted] did not provide any information that we had not already considered, we did not amend the report or alter our conclusions.[1]

We recommend the Secretary of the Navy review the Complainant's Official Military Personnel File to remedy any harm to the Complainant's promotion potential or career as a result of the actions of [redacted], [redacted], and [redacted].

We also recommend the Secretary of the Navy take appropriate action against [redacted], [redacted], and [redacted] for reprising against the Complainant.

[1] While we have included what we believe is a reasonable synopsis of [redacted], [redacted], and [redacted] responses, we recognize that any attempt to summarize risks oversimplification and omission. Accordingly, we incorporated their comments in the appropriate section of the report and provided a copy of each of their full responses to the cognizant management officials together with this report.

II. BACKGROUND

VFA-106 is a U.S. Navy F/A-18 Hornet and F/A-18E/F Super Hornet Fleet Replacement Squadron based at NAS Oceana, Virginia. VFA-106's mission is to "train and prepare the finest strike fighter aircrew and maintenance professionals for the Fleet and Fleet Marine Force in support of combat operations around the world."

The Complainant administratively transferred to VFA-106 on September 1, 2016, for duty as an IP; however, [redacted], he did not physically report to the squadron until October 17, 2016. The Complainant's chain of command was [redacted], USN, VFA-106 [redacted], [redacted], and [redacted]. On June 25, 2018, [redacted], USN, assumed [redacted].

III. SCOPE

This investigation covered the period from April 2017 through October 2018. We interviewed the Complainant, [redacted], [redacted], [redacted], [redacted], and 24 witnesses. We examined documentary evidence including the Complainant's performance evaluations, investigation reports and supporting documentation, e-mails, and other relevant documents.

The Complainant's initial complaint to the DoD Hotline alleged that he had been subject to retaliatory actions and harassment, and that [redacted], [redacted], and [redacted] had knowledge and failed to respond. We determined insufficient evidence existed to establish that the Complainant was the subject of any retaliatory actions or harassment, of which his superiors had knowledge of and failed to respond, and therefore did not consider these allegations to be personnel actions under 10 U.S.C. 1034(b)(2)(A)(iv). Rather, we found that the Complainant had been ostracized, but as the ostracism was not related to any report of sexual assault or criminal conduct, pursuant to 10 U.S.C. 1034 (as amended by the National Defense Authorization Action for Fiscal Year 2014 (Public Law 113-66, December 26, 2013)), the alleged ostracism does not qualify as a retaliatory action. Therefore, it does not qualify for protection under 10 U.S.C 1034.

During the course of our investigation, the Complainant alleged that [redacted] convened, and that [redacted], USN, [redacted], conducted a Fleet Naval Aviator Evaluation Board (FNAEB), as additional acts of reprisal for his protected communications.[2] We determined that pursuant to 10 U.S.C. 1034, insufficient evidence existed to warrant an investigation into the Complainant's allegation that [redacted] convened, and [redacted] conducted the FNAEB in reprisal. We found no inference that the

[2] FNAEBs are administrative boards convened to evaluate the performance, potential, and motivation for continued service of any naval aviator. These boards review and evaluate the overall performance and the specific element of performance or behavior that is the cause for appearance before the board. FNAEBs are fact-finding, evaluative bodies which shall make recommendations through the chain of command to the Type Commander. FNAEBs are not bound by formal rules of evidence and may consider any type of evidence that is reasonably believable or authentic, and that is relevant to the case. FNAEBs are neither judicial nor disciplinary and shall make no recommendation for disciplinary action as a result of its evaluation.

Complainant's protected communications were factors in the convening or conduct of the board; rather, we found that [redacted] made [redacted] determination to convene the FNAEB based on evidence discovered during the course of the VFA-106 CDI, which [redacted] reasonably believed at that time to be credible and authentic, and on the advice and counsel of Commander, Naval Air Forces Atlantic staff. Additionally, we found that [redacted] conducted the FNAEB in strict adherence to Commander, Naval Air Forces Instruction 5420.1G, "Field Naval Aviator Evaluation Board Procedures," and ensured the Complainant: 1) did not object to the composition of the board; 2) had access to all evidence; and 3) was afforded the opportunity to cross-examine all witnesses.

IV. STATUTORY AUTHORITY

The DoD Office of Inspector General (DoD OIG) conducted this whistleblower reprisal investigation pursuant to Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

V. FINDINGS OF FACT

On September 1, 2016, the Complainant transferred to VFA-106, but [redacted], did not physically report to the squadron until October 17, 2016. The Complainant attended Navy Legal Officer School in December 2016, and assumed duty as a VFA-106 legal officer in January 2017.

April 2017 Preliminary Inquiry

On April 23, 2017, [redacted], USN, VFA-106 [redacted], reported to [redacted], VFA-106 [redacted], that [redacted] believed [redacted] was undergoing the FNAEB process and being removed from flight training due to racial discrimination. [redacted] explained that [redacted] notified [redacted] about the complaint, and [redacted] initiated a preliminary inquiry. [redacted] explained that [redacted] told [redacted] that other students who made similar mistakes during flight evolutions had received higher grades, and [redacted] believed that VFA-106 IPs had discriminated against [redacted] due to race.

On April 26, 2017, [redacted] appointed [redacted], USN, VFA-106 IP, to conduct a PI into allegations by [redacted] regarding possible EO and unfair grading issues with VFA-106 IPs[3]. In [redacted] April 28, 2017, report of findings to [redacted], via [redacted], it noted the interviews of [redacted], the Complainant, and three other VFA-106 IPs. [redacted] concluded in the report that [redacted] found no reason to believe [redacted] was mistreated during the evaluation and review of [redacted] performance, and that no further investigation was required.

[3] A PI serves as an analytical tool to help a commander determine whether an investigation is warranted and, if so, how it should be conducted.

The Complainant stated to us that when interviewed by [redacted], he discussed racial demographics, "the striking lack of minorities in general aviation," and it appeared odd that the only student removed from training in over a year was an African American. The Complainant explained that although he did not recall telling [redacted] that racial bias was the reason [redacted] was removed from training, he believed that the general impression he gave [redacted] was that racial bias had influenced [redacted] removal from training.

[redacted] stated to us that [redacted] had no knowledge that the Complainant was interviewed as part of the April 2017 PI, and EO never came up in his discussions with [redacted], [redacted], or [redacted].

Assisting [redacted] in Filing Congressional Complaint

From July 2 through July 25, 2017, the Complainant assisted [redacted] in the preparation and filing of a complaint to the office of U.S. Senator Mark Warner. The Complainant stated he reviewed [redacted] performance records, training history, Human Factors Board (HFB), Performance Review Board (PRB), and FNAEB reports, and assisted [redacted] in the filing of [redacted] complaint to the office of Senator Warner. Additionally, the Complainant stated he provided screenshots from IP chat rooms for inclusion in [redacted] complaint that indicated racial bias on the part of VFA-106 IPs.

On July 25, 2017, [redacted] filed [redacted] complaint with the office of Senator Warner, which alleged that VFA-106 had a climate of racial bias and discrimination that resulted in the attrition of African American and minority Category One (CAT 1) replacement pilots.[4]

From September through October 2017, the Complainant met with Senator Warner's staff to review VFA-106 and naval aviation demographic data, and according to the Complainant, Senator Warner's staff suggested taking the complaint to the media in order to get attention on the issue. The Complainant was unaware of whether Senator Warner's staff ever contacted VFA-106.

USFF Bottle Bets IG Complaint

On November 3, 2017, the Complainant filed a complaint with the USFF IG and alleged that during the October 2017 Carrier Qualification (CQ) phase of instruction, Landing Signal Officer (LSO) instructors were conducting improper bottle bets wagers with students in violation of Title 5 Code of Federal Regulations, Section 2635.301, "Gifts Between Employees," and

[4] CAT 1 pilots are replacement naval aviators completing their initial syllabus training for their first tour in their respective aircraft type. Successful syllabus completion normally results in Naval Air Training and Operations Procedures Standardization (NATOPS) qualification and awards a Military Occupational Specialty.

DoD Regulation 5500.7-R, "Joint Ethics Regulation."[5, 6] The Complainant stated that leadership condoned bottle bets through active participation, that IPs pressured students to participate by threatening to withhold pilot logbook stamps that certify completion of CQ, and that IPs would undermine the reputation of any student who did not agree to participate. Additionally, the Complainant reported that bottle bets were occurring at all naval aviation commands that conducted CQ.

The Complainant submitted documents to the USFF IG, including one titled "LSO BET R.O.E [Rules of Engagement]," which stated students were required to take the "party bet." The documents submitted by the Complainant also included standardized and institutionalized spreadsheets documenting student performance and e-mail correspondence from a VFA-106 IP informing students, "All bets must be settled prior to receiving CQ stamp in logbook." The Complainant felt obligated to report the bottle bets issue after students complained to him about having to participate in bottle bets. The Complainant stated to us that the USFF IG informed him the complaint was forwarded to the CNAL IG for action.

The CNAL IG e-mailed a redacted copy of the Complainant's USFF IG complaint to [redacted] and stated that they believed the "allegation involves a command matter for which ISIC [Immediate Superior in Command] oversight and resolution, rather than IG inquiry is appropriate." The CNAL IG informed [redacted] that it was closing the IG case, but requested final disposition information for the IG database. [redacted] forwarded the complaint to CDR Weyenberg for action.

On November 15, 2017, [redacted] e-mailed the redacted IG complaint to all VFA-106 LSOs and [redacted], and stated in the e-mail that bottle bets were not condoned on any level, and were strictly optional for all.

On November 16, 2017, [redacted] notified the CNAL IG of the following actions it had taken regarding the IG complaint.

- Met with VFA-106 LSOs to emphasize that bottle bets are not an officially supported activity, but individuals were free to make voluntary informal arrangements on a personal level in accordance with ethical behavior.
- Counseled all VFA-106 LSOs on the importance of protecting IG communications because the redacted report had been forwarded to a wider audience.
- Emphasized to the LSOs that forwarding the report was inappropriate and demonstrated bad judgment.

[5] An LSO is a naval aviator specifically trained to facilitate the safe and expeditious recovery of naval aircraft aboard aircraft carriers.

[6] Bottle bet wagers are wagers between the LSO instructors and student pilots related to the student's performance (i.e., catching the target wire, maintaining a certain boarding rate, no technique waveoffs or bolters) during CQ that were paid off with bottles of alcohol. The LSO instructor would grade the student's performance and inform them at the completion of the CQ as to the outcome of their bet.

- Counseled LSOs that any attempt to identify the Complainant, or even speculate on who the Complainant was, would be subject to disciplinary action.

On November 16, 2017, the CNAL IG notified the Complainant of the actions taken by [redacted] regarding his IG complaint. On November 20, 2017, the Complainant responded to the CNAL IG, including text messages he received indicating that the complaint had been widely disseminated across the fleet, and that there appeared to be a concerted effort to identify who the source of the complaint was. The CNAL IG responded that the release of the complaint was an "honest mistake," and to contact them if the Complainant received any "threats or actual harassment." The Complainant stated to us that text messages he received attributed [redacted], USN, VFA-106 [redacted], as the source of the IG complaint. The Complainant told [redacted] that to relieve suspicion, [redacted] ([redacted]) could tell people that it was him (the Complainant) who filed the bottle bets complaint. The Complainant stated that this was how it became widely believed that he was the source of the IG complaint.

USFF EO Complaints: [redacted] *and* [redacted]

From November through December 2017, the Complainant was in regular contact with [redacted] and [redacted], USMC, VFA-106 [redacted], regarding their ongoing EO issues. The Complainant stated [redacted] was also an African American pilot who was removed from training in 2016. The Complainant explained that since there was no action taken on [redacted] EO filing with Senator Warner's office, or [redacted] previous EO filing with the office of Senator Richard Durbin, they decided to file EO complaints with the USFF EO. The Complainant explained that for [redacted], they filled out "whatever hotline forms of paperwork they [the USFF EO Office] needed," including [redacted] previous submission to Senator Warner's office, and that he (the Complainant) assisted [redacted] with creating and submitting [redacted] complaint to the USFF EO Office. On December 18, 2017, the two complaints were filed with USFF EO.

[redacted] stated to us that the Complainant assisted [redacted] with filing [redacted] December 2017 complaint to the USFF EO office by reviewing training documentation to identify discrepancies, providing screenshots from IP chats that indicated racial bias, and editing [redacted] EO submission to Senator Warner's office.

The Commander, Naval Air Force, U.S. Pacific Fleet (CNAP) Staff Judge Advocate's (SJA) office combined [redacted] and [redacted] complaints into one investigation concerning possible violations of Department of the Navy (DoN) EO policies committed by [redacted], [redacted], USN, VFA-106 [redacted], and five other current or former VFA-106 IPs.[7]

On January 11, 2018, [redacted] notified [redacted] of the CNAP EO investigation into racial bias at VFA-106. From January 11 through 16, 2018, [redacted]

[7] [redacted], USN, USFF, was appointed as the IO, but was unable to complete the investigation prior to retiring. CNAP then assigned [redacted], USN, CNAL, as the IO to complete the investigation. On July 1, 2018, [redacted] submitted his report of investigation to Commander Naval Air Forces.

notified [redacted], USN, [redacted], and [redacted], SFWL [redacted] that CNAP was investigating the EO complaint.

On February 12, 2018, [redacted], USN, United States Fleet Forces Command (USFF) Investigating Officer (IO), e-mailed [redacted] regarding the complaint [redacted] had filed with Senator Warner's office. In [redacted] e-mail to [redacted], [redacted] included a copy of [redacted] complaint to Senator Warner's office, and wrote, "I hope [redacted] [redacted] or [redacted] already let you know I might be trying to contact you."

On May, 11, 2018, [redacted] interviewed the Complainant, who provided testimony to [redacted] that he had assisted [redacted] and [redacted] in filing their EO complaints, and that he provided the "Pure Bloods" chat screenshots containing comments indicating negative attitudes toward minorities [eggplant emoji and references to "Obama phones"], and that the culture at VFA-106 was a combination of "unconscious influence and deliberate exclusion."[8]

[redacted] report of investigation noted that [redacted] elected to obtain counsel, and that [redacted] did not provide a statement for the investigation.

Enclosure 24 of [redacted] report of investigation indicates that on January 29, 2018, [redacted] interviewed [redacted] as part of the investigation.

On February 12, 2018, [redacted] was contacted about the EO complaint sent to Senator Warner's office, and on April 6, 2018, [redacted] was informed that [redacted] was an alleged offender in the EO complaint.

[redacted] stated to us that [redacted] was unaware the Complainant had assisted [redacted] and [redacted] with filing their EO complaints.

Congressional to Senator Warner – Bottle Bets

In fall 2017 [redacted] informed [redacted] of the bottle bets IG complaint, and in January or February 2018, leadership informed [redacted] ([redacted]) that the complaint was elevated to the congressional level. [redacted]' concern with the bottle bets complaints was that bottle bets were a longstanding tradition, and the bottle bets complaints contained factual errors, distortions of the truth, and gross oversimplifications of the practice. [redacted] addressed the bottle bets complaints with the LSO community to ensure the practice was being conducted appropriately, and, according to [redacted], there was no attempt to identify who the Complainant was. When we asked about an e-mail [redacted] sent (November 15, 2017) attempting to identify the Complainant from students who had recently completed the CQ phase, [redacted] responded, "I wouldn't say it was an active attempt, but, okay, why would somebody do this," and that there was "anger that was expressed" within the LSO community when it became

[8] "Pure Bloods" chat is an unofficial, private chat comprised of aviators who have graduated from the U.S. Naval Academy.

known that the Complainant had initiated the IG complaint. [redacted] explained that the Complainant self-identified as the initiator of the bottle bets complaints in the January or February 2018 timeframe.

On December 19, 2017, the Complainant submitted a complaint to the office of Senator Warner that across naval aviation, instructor pilots were "... illegally accepting, and sometimes demanding through social pressure and coercion, exorbitant gifts from subordinates in the form of bottles of alcohol [bottle bets]." The Complainant included his November 6, 2017, USFF IG complaint, and further detailed that no action had been taken to stop the activity despite the fact that bottle bets are "illegal and prohibited by federal law." The Complainant included his handwritten notes from the December 15, 2017, All Instructor Meeting (AIM), in which he wrote that [redacted] stated, "bets [bottle bets] are a naval aviation tradition, and if anyone wants to make bets, they can." The Complainant believed bottle bets continued during the December 2017 CQ evolution, and felt obligated after the December 15, 2017, AIM in which [redacted] stated [redacted] supported bottle bets, to report the practice to a "higher level authority." The Complainant believed that having the matter reviewed by someone outside the Navy would be more effective.

Senator Warner's office forwarded the bottle bets complaint to NAVINSGEN, via the DoD OIG. NAVINSGEN opened Case 201800375 to address the bottle bets complaint, and Case 201800235 to address potential issues within USFF (restriction and ostracism). On March 16, 2018, a USFF IG IO conducted a clarification interview with the Complainant, and on March 19, 2018, conducted a clarification interview with [redacted], [redacted], [redacted]. Based on these interviews, the USFF IG found no evidence of restriction or ostracism, and closed its case without action.

In February 2018, the Complainant had followup communications with a representative from NAVINSGEN, and provided additional spreadsheets based on information from students, which indicated that 11 students owed 82 bottles (of alcohol) after the last evolution of CQ.

In February 2018, [redacted] had an "impassioned response" to the Complainant's elevation of the bottle bets complaint to the congressional level. [redacted] sent letters dated February 8, 2018, to CNAL and CNAF staffs, writing, "I am attempting to check my emotion, but cannot hide my passion. I have serious concerns for our heritage, our culture, and the death of our warrior ethos if we lend credence to individuals that do not have the character or fortitude to address these issues in person." Additionally, on February 8, 2018, [redacted] e-mail to the CNAL, CNAP, and CNATRA representatives regarding bottle bets complaints stated: "I have serious concerns for our heritage, our culture, and the warrior ethos if we lend credence to individuals that do not have the character or fortitude to address these issues in person."

On February 9, 2018, [redacted] e-mailed [redacted] to provide the actions [redacted] took on the initial bottle bets complaint, and stated that "given the re-surfacing of the complaint, I am standing by to simply terminate the informal program [bottle bets] altogether."

On February 24, 2018, Vice Admiral (VADM) DeWolfe Miller, USN, Commander, CNAF, released a message to all Naval Air forces terminating the bottle bets practice. In his

message, VADM Miller wrote, "... practices like bottle bets with landing signal officers casts those in positions of leadership and mentoring as betting against the success of their charge .... And practices where instructors expect to receive gifts from their students do not reflect who we are."

On February 26, 2018, after receiving a copy of VADM Miller's message terminating the bottle bets practice, [redacted] sent an e-mail to a group of senior LSOs that was a "sneak preview of what I wrote this weekend." The e-mail read:

> To the leadership that is addressing this: You are harboring cowardice and fostering mediocrity. Rather than nurturing a warrior ethos created by a culture that works hard, plays hard, and fights hard, you cow to popular opinion. In an effort to appease that perceived opinion, you neglect that of the ones who should matter most: the ones we train to be steely-eyed killers flying around our 1100' tools of floating diplomacy with the steady hand and laser-focused gaze. [redacted], I have the fortune and pleasure to share communion with the JOPA [Junior Officer Protection Association] in the hallowed halls of my Institution as well as in the wind, rain, sun and snow on the LSO Platform. I speak for all of us when I say you have lost us. If this is what you value, then we know you no longer value us. And we no longer have confidence and faith in you.

[redacted] ended his e-mail with, "Don't get me wrong; I'm not trying to burn this place down. I want to burn the rest of the motherf*****'s houses down, so ours is the one left standing. The last beacon of hope and a safe haven for those that still believe in what we should stand for." [redacted] stated to us [redacted] never sent this e-mail to leadership, and [redacted] was just venting to [redacted] confidantes.

[redacted], USN, [redacted], stated to us that [redacted] had a negative reaction to the Complainant's bottle bets complaints, and this was similar to the reaction from "a lot of the LSOs." [redacted] stated that the LSO community initially had a disgruntled feeling that "someone was meddling in maybe something that was not their business by virtue of not being an LSO," and expressed concern because the complaint indicated that LSOs were intentionally downgrading students' performance to win bottle bets.

On March 6, 2018, [redacted] wrote in an e-mail to a non-DoD civilian that "bottle bets are forbidden ... after a malcontent VFA-106 core IP launched a Navy and congressional IG on tradition that dates back to straight decks on the Great Lakes. Giant can of worms that I'm considering on how to unleash on the world." When we asked [redacted] to explain the language in [redacted] e-mail, [redacted] stated that [redacted] did not remember. [redacted] stated that [redacted] viewed this as a matter of principle, and [redacted] did not like "how all this went down." [redacted] explained to us that nobody had ever said anything about bottle bets before, and now it had been elevated to the IG based on the opinion of an individual.

On March 11, 2018, Senator Warner's staff notified the Complainant that on February 24, 2018, the Commander Naval Air Forces released a "Personal For" message (241244ZFEB18) to the naval aviation community immediately ceasing all bottle bets activities.

On March 15, 2018, the Complainant met with [redacted], who told him a "rift" was forming between the Complainant and other IPs as a result of the rumor that he (the

Complainant) had initiated the bottle bets complaints. The Complainant provided us with an audio file of his March 15, 2018, conversation with [redacted]. Our transcription of the audio files indicated the following issues were discussed.

- [redacted] commented that [redacted] sensed a "rift" between the Complainant and other junior officers and that people had speculated the Complainant had submitted the bottle bets IG complaint.
- [redacted] stated that [redacted] did not want any "mistrust" in the squadron.
- [redacted] stated that [redacted] discussed the issues with the [redacted], and had asked them to talk to the Complainant.

On March 16, 2018, the Complainant spoke with [redacted], USFF IG [redacted], concerning the notes included in the Complainant's submission to Senator Warner's office regarding [redacted] December 15, 2017, AIM comments.[9] The Complainant was uncertain whether [redacted] had contacted anyone at VFA-106 regarding the restrictive language.

On March 20, 2018, the Complainant stated he met with [redacted], USN, VFA 106 IP, and [redacted], USN, VFA-106 IP, regarding an upcoming detachment, when [redacted] asked him (the Complainant) if he had filed the bottle bets complaints. The Complainant responded that "it was probably obvious at that point that I was," and [redacted] commented, "Okay, we don't care, but [redacted] was asking." [redacted] stated to us that, at [redacted] request, [redacted] and [redacted] met with the Complainant to clarify whether the Complainant had filed the bottle bets complaints, and to let the Complainant know "that no matter what he did, he's part of our organization and we wanted to bring him into the fold and we felt that he had potentially felt ostracized.". [redacted] stated the intent of the meeting was to ensure that if the Complainant had any issues with the syllabus, instructors, or students, that he brought those issues to [redacted] or [redacted] before reporting to "someone that is outside, or well above the chain of command." [redacted] stated that rumors the Complainant had initiated the "bottle bets" IG complaint caused concerns, and that "prior to having another one [IG/congressional complaint]," they wanted to talk with the Complainant to establish communication and trust. [redacted] affirmed that the Complainant stated that it was obvious that it was he who filed the "bottle bets" complaint.

[redacted] stated to us that on [redacted] arrival at VFA-106 in January 2018, it was widely speculated that the Complainant had initiated the IG complaint on bottle bets. [redacted] stated that after a few months of observation, [redacted] realized the Complainant did not "fit in terribly well with the rest of the JOs [junior officers]," and "there was probably some animosity for him initiating, or at least what everybody thinks was him initiating the IG on the bottle bets." [redacted] stated that after the bottle bets complaint, [redacted] had several conversations with the junior officers to tell them they needed to "bring him [the Complainant] into the fold,"

[9] [redacted] initiated contact with the Complainant because the Complainant's notes indicated [redacted] used potentially restrictive language at the December 15, 2017, AIM. The restriction allegation against [redacted] is being handled under a separate case (20180516-051435-CASE-03). The March 16, 2018, communication is noted here as a protected communication only.

and to "fix him, and make sure that he succeeds." [redacted] stated that over time, [redacted] sentiment changed to, "... stay away from this guy...he is trouble."

Military.com Article

On April 4, 2018, *Military.com* published an online article by Hope Hodge Seck, "*Naval Aviators Say They Were Kicked Out of Training Due to Racial Bias.*" The article detailed the experiences of [redacted] and [redacted] while undergoing training at VFA-106, and noted both students believed they were removed from training due to racial bias. The Complainant was also interviewed for the article and quoted as stating, "... the uniform nature of pilot culture creates a breeding ground for implicit biases of all kinds to take hold, including racial, gender, and even personality-based prejudice," noting that he (the Complainant) had reviewed [redacted] paperwork and was more convinced that bias played a role in [redacted] separation.

On April 4, 2018, [redacted], VFA-106 [redacted] while on the Fallon, Nevada, Strike Detachment, observed [redacted] and other VFA-106 instructors discussing the Complainant's comments in the *Military.com* article. [redacted] stated to us the article "drew the ire" of many of the instructors, and that [redacted] stated, "I'm going to destroy him." [redacted] explained [redacted] believed that [redacted] was "fed up with" the Complainant expressing his viewpoints, and the nature of [redacted] comment "seemed like it was just an effort to retaliate."

On April 5, 2018, in response to the release of the *Military.com* article, [redacted] called the Complainant and told him that "a lot of people were really upset about the article's content, but that they would get over it eventually." The Complainant provided us his notes of the April 5, 2018, phone conversation with [redacted] detailing their conversation.

- [redacted] stated [redacted] would have preferred that the Complainant inform [redacted] he had spoken with a reporter, and that an article about the command was going to be released.
- The Complainant responded that he had considered informing [redacted], but due to the ongoing EO investigation, he (the Complainant) was under the impression that he was not supposed to discuss the matter with personnel under investigation.
- The Complainant informed [redacted] that he had been working with [redacted] and [redacted] for over a year on their EO complaints, and it was at the recommendation of Senator Warner's staff that they decided to go to the press in order to "spur action" by the Navy to address the EO complaints.
- [redacted] wanted to make sure the Complainant was okay and being treated fine.
- [redacted] wanted to ensure the Complainant was teaching the "standard," and if the Complainant had different techniques for doing things in the aircraft,

> "that was okay, after [the Complainant] finished the Instructor Under Training (IUT) syllabus."[10]

The Complainant stated to us that he believed [redacted] reference to teaching the "standard," was an "early sign" of the direction they were trying to move to take action against him, and referenced feedback received from the March 5, 2018, event he flew with [redacted] about deviating from the standardized sequence of events for the flight.

When we asked the Complainant if, during the April 5, 2018, phone conversation with [redacted], he made any allegations that racial bias or discrimination were ongoing at VFA-106, the Complainant stated, "No, I just mentioned that I had been working with [redacted] and [redacted] the last year, and that I was involved [in the EO complaints]."

[redacted] stated to us that [redacted] spoke to the Complainant in regard to the release of the *Military.com* article, and that the Complainant informed [redacted] that he had been advised by Senator Warner's staff to "tell no one" prior to the release of the article.

On April 9, 2018, VFA-106 held an All Officers Meeting (AOM). [redacted] stated to us that at the AOM, [redacted] discussed the release of the *Military.com* article and said that the squadron would be reviewed or investigated, and [redacted] briefed IPs not to talk about it [the investigation], and to "continue to do our jobs."

[redacted], USN, VFA-106 [redacted], stated to us [redacted] spoke with [redacted] about the allegations (racial bias) in the *Military.com* article, and [redacted] was "shocked," and wondered what [redacted] had done to make someone feel like they could not approach [redacted] about something so serious. [redacted] explained that [redacted] was "upset or disappointed [redacted] had something going on, and nobody came to tell him."

In April 2018, [redacted] read the *Military.com* article and became aware that the Complainant was materially assisting students with their EO complaints. [redacted] discussed the Complainant's involvement in the *Military.com* article and the ongoing USFF EO complaint with [redacted]. [redacted] believed [redacted] was frustrated that the Complainant had gone outside the chain of command without first taking his concerns to leadership, and that the Complainant's statements had cast a negative light on VFA-106. [redacted] believed [redacted] knowledge that the Complainant had participated in filing congressional, EO, and IG complaints caused [redacted] to be "slow to act [in response to concerns that the Complainant was teaching unapproved techniques to student pilots and instructing in areas for which he was not qualified, which could result in an aircraft mishap]," and [redacted] "under-reacted" to safety concerns regarding the Complainant's actions due to concerns the Complainant would file a reprisal complaint.

[redacted] stated to us that [redacted] only knowledge regarding the Complainant's assistance

[10] The Instructor Under Training syllabus trains and qualifies fleet experienced naval aviators assigned to VFA-106 to instruct in specific phases of training.

with [redacted] and [redacted] EO complaints was limited to what was contained in the *Military.com* article. [redacted] did not perceive that the Complainant was involved with the EO complaints (USFF and congressional), but as the IO for the CDI into the Complainant's actions, chose to include the article in the investigation because "it's readily available on Google."

April 12, 2018 – Change Request Alleging Retaliation for Whistleblowing

On April 11, 2018, VFA-106 conducted an All Instructor Meeting (AIM) to discuss processes for suggesting changes to the training syllabus. [redacted] stated to us that the purpose of the April 11, 2018, AIM was to discuss syllabus and instructional standardization, and processes for IPs to submit change requests.

On April 12, 2018, [redacted], USN, VFA-106 [redacted], informed the Complainant that he needed to meet with the [redacted] because of concerns about his (the Complainant's) mental state. [redacted] stated to us that [redacted] did not want to conduct a formal Human Factors Board (HFB) on the Complainant, but wanted an "impartial witness" to talk to the Complainant about his state of mind to "make sure he's okay to fly."

On April 12, 2018, the Complainant e-mailed four change requests to his chain of command and all VFA-106 IPs. The Complainant's change request contained discussion of bottle bets, wherein he wrote, "The kind of ostracism and retaliation I have received for reporting institutionalized illegal behavior [bottle bets], such as being recommended to a mental health evaluation, send a very clear message that anyone who attempts to improve or change the organization for the better will be met with extreme negative and potentially career-ending consequences."[11] In e-mail correspondence to us, the Complainant stated he believed the change request was his "attempt to propose that some mechanisms be designed into the syllabus structure that encourages, facilitates, or at least protects individual who speak up," and that he was being referred to a "retaliatory mental health evaluation" in response for his reporting of bottle bets, and for assisting [redacted] and [redacted] with filing EO complaints. The Complainant stated that he was concerned other IPs and students watching his situation would be deterred from speaking up when things were not right.

On April 12, 2018, [redacted] forwarded the Complainant's change request e-mail to [redacted] personal e-mail account. [redacted] viewed the Complainant's change request e-mail "as if the Complainant was soliciting and inviting e-mail responses that he could then use to show reprisal and ostracism," and [redacted] believed the Complainant would file a whistleblower reprisal complaint with the DoD OIG. [redacted] did not take any action on the Complainant's change request because [redacted] felt "marginalized to do anything," and direct contact with the Complainant would somehow be used against [redacted] When we asked whether [redacted] ([redacted]) believed [redacted] or [redacted] felt marginalized due to the

[11] In the Complainant's May 13, 2018, complaint to the DoD Hotline, he initially alleged that he had been subject to a mental health evaluation. During our August 13, 2018, interview with the Complainant, he agreed that the April 13, 2018, meeting with [redacted], USN, CSFWL [redacted], and [redacted] was not a mental health evaluation.

Complainant's actions, [redacted] responded, "... I think it was shared by everyone in the command, by the entire instructor cadre and chain of command of VFA 106."

[redacted] read the Complainant's April 12, 2018, e-mail and viewed the Complainant's change request alleging harassment and retaliation as a "trap." [redacted] believed the Complainant was trying to "bait" the other IPs into retaliating more, or retaliating via e-mail, and that [redacted] ([redacted]) told [redacted] the Complainant's change request needed to be dealt with through legal channels. [redacted] explained the Complainant's change request was not the proper forum to voice retaliation concerns, and did not contain any specific facts for which action could be taken; rather, it was merely an accusation of retaliation and harassment. [redacted] stated to us that "it only became apparent that [the Complainant] was the guy who initiated it [bottle bets, IG, and congressional complaints]" after the Complainant sent out the April 12, 2018, e-mail.

On July 8, 2018, [redacted], VFA-106 [redacted], sent [redacted] the Complainant's April 12, 2018, change request e-mail. [redacted] used the Complainant's April 12, 2018, change request as part of the lines of evidence of the CDI [redacted] was conducting.

[redacted], USN, CSWFL [redacted], stated to us, "there's definitely been some fear around, surrounding decision making [regarding the Complainant], and everybody has been a little tense." [redacted] explained that leadership did not want to make a mistake for fear the Complainant would initiate another complaint against them.

On April 13, 2018, [redacted] and [redacted] met with the Complainant to discuss operational risk management concerns. [redacted] stated to us that after the two articles were discovered, [redacted], USN, [redacted] directed [redacted] to meet with the Complainant to ascertain whether he was "safe to fly," or whether an HFB or other action by the VFA-106 chain of command was warranted. [redacted] summarized the meeting discussion results as follows.

- The purpose of the meeting was to develop a recommendation for [redacted] about the Complainant's ability to safely perform his duties in light of the recent media attention, and whether the Complainant was willing and able to teach according to the VFA-106 standardized syllabus.
- The Complainant's rationale for filing the bottle bets complaints,
- The Complainant's rationale for participating in the *Military.com* article.
- The Complainant's willingness and desire to instruct in accordance with the established standardization guides; primarily, the use of simulators with students in the CQ phase. The Complainant expressed that he had never been told that what he was doing in the simulator with students was wrong.
- Recommendations: Allow the Complainant to continue to perform his instructional duties; formally counsel and document the guidance to not instruct in areas not qualified; informally discuss and counsel on the proper use of the chain of command to resolve concerns prior to seeking outside intervention; do not perform an HFB; and re-evaluate in 90 days.

[redacted] e-mailed the summary of the results of the meeting to [redacted]; [redacted], USN, [redacted]; [redacted]; [redacted]; and [redacted].

On April 16, 2018, the Complainant e-mailed [redacted] and requested a "copy of your written recommendations from my mental health evaluation." [redacted] responded, and blind carbon copied [redacted] that [redacted] ([redacted]) was "not qualified to perform a mental health evaluation," and that the purpose of the meeting was to identify if there were significant operational risk management concerns with all the attention the Complainant had been receiving (appearance in media articles), and if there were any concerns with adherence to standard operating procedures.

May 2018 USFF EO Investigation Interview

On May 11, 2018, [redacted] interviewed the Complainant as part of the USFF EO investigation into [redacted] and [redacted] EO complaint. [redacted] and the Complainant discussed the language used in text and chat screenshots included in the EO complaints regarding VFA-106 IPs sharing jokes about racist stereotypes, and non-standard performance reports that were used to justify their removal from training.

Hotline Complaint to DoD OIG

On May 13, 2018, the Complainant filed a DoD Hotline complaint for being reprised against for making protected communications, as previously described.

On July 27, 2018, [redacted] e-mailed [redacted], USN, CNAL [redacted] and [redacted], USN, CNAL [redacted] notifying them that the writer of the *Military.com* article notified the [redacted] that the Complainant had filed a "Military Whistleblower Protection Act complaint." [redacted] wrote [redacted] "figured this was likely," and that [redacted] would be happy to let CSFWL or CNAL "pull the investigation and any action from it up to their level." [redacted] believed that from the time the investigation was initiated, it was a foregone conclusion that the Complainant would file an additional IG complaint.

[redacted] stated to us that beginning in May 2018, based on the Complainant's past actions, [redacted] had a "gut feeling" the Complainant would file an IG complaint because of the command investigations. [redacted] stated that during the CDI [redacted] conducted, [redacted] notified numerous witnesses that the Complainant had established a "pattern of behavior going outside the lifelines [media articles, IG, and congressional complaints]."

Instructional Standardization Concerns

VFA-106 IPs are expected to complete with Dual, Transition, Strike, and Fighter qualifications within 6 months of check-in, and the average time to complete the Transition syllabus is 3 weeks. At the time of his FNAEB, October 23, 2018, the Complainant had not completed the IUT syllabus for Transition, Strike, Fighter, or CQ phases.

On April 8, 2018, [redacted] e-mailed [redacted] with standardization issues [redacted] observed from a March 5, 2018, training event [redacted] conducted with the Complainant. [redacted] noted deficiencies in the Complainant's briefing of the event, and that during the event the Complainant deviated from standard sequences. [redacted] debriefed the Complainant, and stated that the Complainant was receptive to feedback.

On April 10, 2018, [redacted], USN, VFA-106 IP, e-mailed [redacted] issues [redacted] observed during a February 5, 2018, training event [redacted] conducted with the Complainant. [redacted] noted deficiencies in the Complainant's briefing of the event, but nothing that was against the standard operating procedures or standardization guide.

On March 9, 2018, [redacted] scheduled [redacted] to conduct a training event with the Complainant to evaluate if there was a valid concern. Due to aircraft maintenance issues, they (the Complainant and [redacted]) only executed the "brief" portion of the event. [redacted] explained that the Complainant misunderstood the flight schedule and was unaware he was supposed to brief the event. [redacted] requested the Complainant brief the event anyway, and [redacted] noted the Complainant's brief was not in accordance with standardized instructions, and that the Complainant was unwilling to accept any feedback or criticism. On April 10, 2018, [redacted] e-mailed a memorandum to [redacted] noting the deficiencies observed from [redacted], and [redacted] training events with the Complainant.

In March or April 2018, a student told [redacted], USN, VFA-106 IP, that the Complainant had offered to "give [redacted] [the Student] some techniques" on qualifying during CQ. [redacted], knowing the Complainant was not a CQ instructor, notified the CQ Phase Head and [redacted]. [redacted] stated to us that [redacted] became nervous about how many other students the Complainant may have provided information to on CQ, as [redacted] was worried about students performing incorrect techniques during a dangerous phase of flying (carrier landings).

On April 17, 2018, [redacted] e-mailed [redacted] with statements from [redacted] students regarding their interactions with the Complainant providing instruction for CQ. In [redacted] e-mail to [redacted], [redacted] stated that VFA-106 LSO IPs would carefully monitor the students leading up to the CQ, and if they showed any indications of nonstandard techniques, they would not be allowed to perform the actual CQ at the ship. The statements of the five students indicated that the Complainant provided them instructional materials, but none of the students indicated that they performed any practice simulators with the Complainant.

On April 20, 2018, [redacted], USN, VFA-106 [redacted] e-mailed [redacted] and detailed the interactions [redacted] had with the Complainant. In [redacted] e-mail, [redacted] stated that [redacted] had never reviewed the Complainant's instructional material, but had performed two landing practice simulators with the Complainant during the familiarization phase (the first phase of training). [redacted] stated to us that during [redacted] CQ phase (April 2017), [redacted] addressed the class and told them not to interact with the Complainant, and the concern was that the Complainant was not an LSO, and was teaching people bad techniques regarding CQ, which could ultimately result in a mishap.

On April 25, 2018, [redacted] disqualified (DQ) during CQ due to a cut pass (failure to wave off during CQ).[12] VFA-106 conducted three Performance Review Boards (PRBs) on [redacted]. The third PRB found that although the Complainant taught [redacted] "velocity vector gouge [non-standard carrier landing technique]," [redacted] was not using "velocity vector gouge" during his CQ.

On May 1, 2018, [redacted], USN, VFA-106 IP, sent [redacted] an e-mail [redacted] had received from a student who observed the Complainant discussing fighter tactics with a Marine officer [redacted]). [redacted] asserted in [redacted] e-mail that this was proof the Complainant was providing instruction in a phase of training he was not qualified to instruct. On May 1, 2018, [redacted] questioned [redacted] about [redacted] interactions with the Complainant regarding going over introductory material for the Fighter phase of instruction. [redacted] explained to [redacted] that they were only reviewing introductory material the Complainant was qualified to instruct, but [redacted] was not interested in the specifics, and directed [redacted] to "receive no further instruction" from the Complainant.

[redacted] provided a statement to us prior to invoking [redacted] right to remain silent, stating that [redacted] had removed the Complainant's IP duties for providing unauthorized instruction to students during the CQ phase. [redacted] explained that CQ is an extremely dangerous evolution and only specifically trained and appointed IPs are authorized to instruct in CQ. [redacted] claimed [redacted] initiated the CDI because the Complainant's unauthorized instruction represented an "unmitigated risk" and "safety concern." [redacted] detailed the following sequence of events.

- The publishing of the *Military.com* article on racial bias led "people" to search for the Complainant's article online, where it was discovered that the Complainant was interviewed for an article published in *Peak Deliberate Practice.com* titled, "*An Interview with: A Naval F-18 Pilot and Trainer*." In the interview/blog, the Complainant stated that he had conducted CQ simulators with students with a 100 percent pass rate.
- [redacted] questioned why the Complainant was providing instruction in CQ since he was not qualified to teach in the CQ phase.
- On April 26, 2018, a student [N.F.I.] informed [redacted] that the Complainant had distributed CQ training material and performed CQ simulators outside of scheduled syllabus events.
- [redacted] noted the Complainant was instructed to stop using the same CQ landing techniques in his previous squadron and air wing.
- [redacted] and [redacted] met with the Complainant and asked him why he was teaching in the CQ phase, which he was not qualified for. The Complainant did not directly respond; rather, he stated, "I felt I was teaching inside the SOP."
- [redacted] stated that the Complainant's responses were not satisfactory, and [redacted] ([redacted]) had a "significant safety concern," especially since there was an upcoming CQ detachment.

[12] A cut pass is an unsafe pass with unacceptable deviations, typically after a wave off is possible. A wave off is an action to abort a landing initiated by the bridge, primary flight control, LSO, or pilot. The response to a wave off signal is mandatory.

- [redacted] met with the upcoming CQ class ([redacted]) and asked them to provide information to their class advisor if they had received any training from a VFA-106 IP who was not qualified to teach CQ.
- [redacted] stated, "It [teaching non-standard techniques] was a safety concern for the students, the LSOs, the flight deck crew of the aircraft carrier, and the aircraft itself – all unmitigated risk – [and the reason] that I [redacted] initiated a Command Investigation." [redacted] contacted the CNATRA and CNAL SJAs to ensure a CDI was done via "concrete legal means, and why [the Complainant] was temporarily removed from instructional duty."

[redacted] explained that when it was discovered the Complainant was teaching non-standard techniques to students preparing for CQ, [redacted] considered cancelling the CQ for [redacted] but after talking with the students to ascertain whether they were taught, or if they were flying non-standard CQ techniques, [redacted] decided to proceed with the CQ. During the CQ, [redacted] was DQ and sent to a PRB. [redacted] explained that when [redacted] learned the Complainant was "coaching [redacted]" during the PRB, [redacted] ([redacted]) decided to investigate. [redacted] explained that IPs go through the IUT process to learn the right way to teach students; if IPs do not follow the IUT syllabus, students will not learn "standardization," and following the IUT syllabus places a "special faith and trust" in IPs to teach replacement students for the first time. [redacted] believed the Complainant prioritized "teaching on the side," instead of getting his IUT qualifications.

[redacted] explained the concerns with the Complainant adhering to standardization arose when IPs discovered the Complainant had discussed teaching students in CQ in the *Peak Deliberate Practice.com* article. [redacted] explained [redacted] CQ phase coincided with discovery of the Complainant's "Google dropbox" containing "velocity vector gouge" materials, and LSOs became concerned students might utilize the Complainant's techniques during CQ, which could result in a mishap. [redacted] stated that [redacted] and [redacted] "genuinely had a concern" about what the Complainant was teaching, and whether it might lead to "a plane getting wrecked or ... people getting killed on a flight deck."

[redacted] stated to us that a recurring theme throughout many of [redacted] CDI interviews was the Complainant being "outside the fold of the squadron." [redacted] explained that many of the IP cadre had expressed a general feeling of betrayal due to the media articles and bottle bets IG complaints, and that this was occurring outside the squadron without any discussion with squadron personnel. [redacted] explained that the Complainant's actions caused his "self-imposed exile" within the squadron, and that the Complainant's *Military.com* and *Peak Deliberate Practice.com* articles containing disparaging comments about VFA-106 IPs did not "paint a very pretty picture of VFA-106," adding to a sense of distrust.

On May 3, 2018, [redacted] e-mailed [redacted] and [redacted] to provide an update on [redacted] CQ DQ PRB, stating that:

- the overall impression from the initial PRB was that [redacted] did not attempt to use non-standard CQ landing techniques;

- immediately after the first PRB, [redacted] contacted the Complainant;
- after speaking with [redacted], the Complainant contacted [redacted];
- during this time (early May), the Complainant was seen providing instruction to students outside of his qualifications; and
- enough information existed for the command to question the Complainant's techniques, procedures, and motives; therefore, he would remain off the flight schedule in any official capacity in order for the command to gain a clear picture of exactly what was being instructed, and to whom. Concern for flight safety was the number one contributor, in addition to the teacher-student relationship.

On May 14, 2018, [redacted] e-mailed [redacted] regarding the things [redacted] wanted the Complainant to stop doing, or start doing (continuously), including:

- stop creating a confusing student-instructor relationship;
- stop digging through the share drive to pilfer/distribute student information to anyone else, including the media;
- stop interfering with PRB, HFB or FNAEB processes;
- stop distributing his "material";
- stop teaching/chalk talks that are outside his lane;
- stop circumventing the chain of command;
- stop creating unnecessary risk for VFA-106; and
- start teaching within his lane and get qualifications.

Removal of Instructional Duties

On May 3, 2018, [redacted] and [redacted] directed that the Complainant was no longer authorized to perform any instructional duties. The Complainant stated that [redacted] said the decision to remove his ability to perform instructional duties was for providing instruction beyond the phases he was qualified to instruct. The Complainant explained to us that his instructional duties were critical to stand out for promotion to lieutenant commander and selection to department head, and that without being able to perform his instructional duties, it would be difficult for him to appear competitive on his fitness report.

On May 2, 2018, the Complainant and [redacted] spoke telephonically, which the Complainant believed [redacted] shared with [redacted], prompting the decision to remove his instructional responsibilities. In an e-mail to us, the Complainant stated that during the conversation with [redacted], he (the Complainant) did not request to "teach on the side." The Complainant sent us an audio file recording of his May 2, 2018, conversation with [redacted]. A transcription of the audio file showed that:

- the Complainant stated that students wanted to work with him in all phases of training, but that they had been directed not to interact with him;
- [redacted] asked the Complainant if he was qualified in all phases;
- the Complainant stated to [redacted] that he had been doing simulators and created practice exercises for students in CQ, and that he (the Complainant) was not an LSO, and not qualified to teach in the CQ phase;

- [redacted] told the Complainant he could not teach outside the standardized syllabus, and that he was to tell students he was not qualified to teach in that phase;
- the Complainant told [redacted] that nobody had ever told him he was not supposed to be doing simulators with students;
- [redacted] told the Complainant to teach only in areas for which the Complainant was qualified, and to leave CQ to the LSOs; and
- the Complainant and [redacted] discussed [redacted] recent CQ incident.

On May 2, 2018, during a telephonic discussion, [redacted] told the Complainant that he should only be instructing in phases for which he was qualified to instruct, that if he had a better way of training students, to submit a change request, and "that if you're not an LSO, you shouldn't be teaching people how to land on a boat, period." [redacted] explained to us that CQ is treated separately from every other phase of training, and that training pilots in CQ is reserved "completely for training qualified LSOs." On May 2, 2018, [redacted] texted [redacted], reporting that [redacted] had spoken with the Complainant.

On May 3, 2018, [redacted], with [redacted] present as a witness, met with the Complainant and verbally counseled him on removal of his IP duties and responsibilities, and other concerns. The Complainant provided us notes from the meeting, describing their discussion points.

- [redacted] told the Complainant, "until the whole situation could be looked at more closely, [the Complainant] is not to fly, sim (use the simulator), give chalk talks, or provide any instruction whatsoever to any student."
- [redacted] told the Complainant it was "a matter of trust."
- [redacted] told the Complainant that he should not have used an enlisted person as a reference for his security interview.
- They discussed the fact that the Complainant had contacted [redacted] on May 2, 2018.
- [redacted] told the Complainant it was strange that a student who went to a PRB for failing a phase of training the Complainant was not qualified to teach would call the Complainant after the PRB.
- [redacted] told the Complainant that the [redacted] told him (the Complainant) not to instruct in phases for which he had not completed in IUT, and that [redacted] ([redacted]) had told the Complainant the same thing on March 2, 2018.

[redacted] stated to us that [redacted] believed the Complainant used his "legal knowledge and protected communications to instill fear and intimidate the instructor [*sic*] of VFA-106 in order to manipulate the command into bending to his will." [redacted] stated that, if not for the Complainant's protected communications (assisting in EO, congressional, and IG complaints), [redacted] would have removed him from training as soon as it became known that he was teaching incorrectly. [redacted] explained that [redacted] felt "marginalized" and "powerless" to confront the Complainant directly about his training methods because "to do so would simply lead him to a claim of reprisal." [redacted] stated to us that [redacted] and

[redacted] removed the Complainant's IP duties because the Complainant could not be trusted to teach per the syllabus.

[redacted] stated to us that [redacted] informed [redacted] that [redacted] had removed the Complainant's IP duties due to "safety of flight" concerns, and because [redacted] did not know what the Complainant was teaching.

[redacted] provided us with data for IPs who had their instructional duties removed from April 2016 through fall 2018 for deviations from standardized procedures, safety of flight concerns, poor performance, or poor judgement. [redacted] explained scenarios which may cause a CO to remove an IP's instructional duties, qualifications, or flight status, including breeches in flight discipline, disregard for the safety of the aircraft or aircrew, lack of knowledge, violations of standard operating publications, personal pressures, legal matters, or lack of trust and confidence. As shown in the table below, there were 10 incidents that involved 12 personnel. The Complainant was involved in two of the incidents. One incident resulted in a preliminary inquiry; however, the IP was not removed from instructor duty during the preliminary inquiry.

VFA-106 Instructor Performance Issues and Remediation

Personnel	Date	Incident	Period Grounded	Remediation
LT & Capt	April 2016	Low transition over departure end of runway	14 days	CO reprimand, 2 weeks extra duty
Maj	April 2016	Incapable of teaching tactics due to lack of effort	N/A (Guest)	Permanently removed as a guest instructor
LT	April 2016	3 high aspect passes within 500 feet	0 days	Loss of FTR and BFM qualifications, required to complete the BFM syllabus
LT	Oct. 2016	Lost control of aircraft, continued with event	90 days	CO reprimand, presented lessons learned
LT	March 2017	Removed hand from controls during aerobatic maneuver	7 days	HFB, CO reprimand for unsafe action
2 x LT	Fall 2017	Flew at weather minimums (poor judgment)	1 day	Counseled by XO
2 x LT	March 2018	Lower than normal transition at air show	0 days	Counseled, PI conducted, revealed flew professionally, just a mistake
LT	Spring 2018	Multiple non-standard TTPs during events	0 days	Counseled by Training Officer, flew with Transition Phase Head
LT	Spring 2018	Training in phases not qualified	Perm	HFB, FNAEB, Administrative process ongoing
Maj	Fall 2018	Arrested for domestic altercation	21 days	Charges dropped, returned to flight status once Human Factor no longer an issue

* Items in yellow indicate incidents involving the Complainant.

[redacted] explained that when issues were addressed or remediated, and confidence was restored, then duties, qualifications, and flight status were restored.

Reassignment from Legal Officer to Assistant Administration Officer

On May 4, 2018, [redacted] and [redacted] reassigned the Complainant from the Legal Officer billet to an Assistant Administration Officer billet. The Complainant provided us notes from his May 4, 2018, conversation with [redacted], describing their conversation as:

- the Complainant asked if the restriction on his ability to instruct applied to his duties as legal officer, or standing duty;
- [redacted] told the Complainant that their conversation would be off the record, that [redacted] did not want to see it in the press or recorded, and that the Complainant would be moved from legal officer to assistant administration officer;
- [redacted] told the Complainant, regarding the bottle bets IG complaint, that [redacted] did not understand why he went to the IG without attempting to address the issue within the command;
- the Complainant explained that he was receiving complaints from students, that he did not believe the [redacted] had the authority to address the issue in other commands, and that after discussing the issue with the IG, they had recommended that he submit a complaint;
- [redacted] told the Complainant that it was not his responsibility to address the issue, to always try to keep things at the lowest level, and that the Complainant should have let [redacted] address it. [redacted] told the Complainant that by skipping the unit level and going straight to the IG, he had created a trust issue;
- [redacted] told the Complainant that he should have told students who complained to "have some spine," and that if they did not want to participate (bottle bets), they did not have to;
- [redacted] told the Complainant that he had a history of teaching people to use velocity vector for carrier landings, and it was important he understand that just because he may be able to do something more advanced or complicated, it did not mean students were capable, and it was important that when IPs went out on a flight with a student, that they could trust the student would adhere to the standardization guide;
- [redacted] told the Complainant that he had put [redacted] in a bad situation by allowing [redacted] to take the blame for initiating the bottle bets IG complaint;
- the Complainant explained to [redacted] that he told [redacted] that he (the Complainant) had filed the complaint, and that [redacted] could identify him; and
- [redacted] told the Complainant that he should have notified the command prior to the *Military.com* article being published; the Complainant responded that he did not believe he could discuss EO issues with the people under investigation, and that Senator Warner's staff had recommended going to the press with the issue.

The Complainant stated to us that the billet he was moved into had "no real specific responsibilities or personnel that [he] was responsible for," and that the duties he was given were to assist with the change of command and oversee the command SharePoint website. The Complainant explained that the change of command was completed on June 25, 2018, and that he was not given necessary permissions to manage the SharePoint website, which resulted in him having "nothing I was able to do, and nothing was provided for me to do." The Complainant explained that without responsibilities (duties to be performed, or personnel to manage), it

"leaves for a pretty empty performance evaluation," which could impact promotion potential and selection for department head. The Complainant stated that ground jobs for lieutenants are normally rotated on a quarterly basis, and the normal duration for an officer in the legal officer billet was 9 months. The Complainant stated that he was in the legal officer billet longer than normal, but it was not common practice for billet changes outside quarterly cycles. The Complainant believed that [redacted] and [redacted] removed him from the legal officer billet to isolate him from other pilots, and to keep him from having knowledge of legal action taken against him.

[redacted] stated to us that the Complainant's reassignment was in response to the *Military.com* article and the racism issues the Complainant had brought to light. [redacted] explained that [redacted] lacked trust in the Complainant, who had access to "privacy sensitive, official use only kind of stuff that the legal office sees," and [redacted] and [redacted] could not trust the Complainant would not release sensitive information. [redacted] explained that [redacted] and [redacted] decided to pull the Complainant out of legal, but [redacted] ([redacted]) convinced them to assign the Complainant to assistant administration officer in his department. [redacted] explained that [redacted] told [redacted] and [redacted] the move would be a "bit of a promotion," as the Complainant was moving from being one of three legal officers, to being the assistant administration officer with oversight of the Administration Department. [redacted] assigned the Complainant two "big" projects, the first being oversight of the June 25, 2018 change of command, overseeing the other lieutenants who were working different portions of the change of command; and the second being the administration of the VFA-106 SharePoint website, updating various information including website links, command policies, and command biographies.

[redacted] stated to us that [redacted] did not view the assistant administration officer position as a demotion because it is normally staffed by lieutenant commanders, and the Complainant could compete favorably for fitness reports.

Threatened with Disciplinary Action

On May 7, 2018, according to the Complainant, [redacted] informed him that [redacted] intended to issue him a Letter of Instruction (LOI), and if he did not accept the LOI there would "probably be a command investigation and it would be messy for everybody." The Complainant stated that [redacted] did not provide a reason for the LOI or CDI, and that he believed an LOI is "formal counseling for an officer," and that by asking him to sign it, he believed it was going to be filed in his official service record, which could impact his promotion potential. The Complainant explained that he did not know "what they're expecting to uncover" with a CDI, but "whatever they put together" could be used for disciplinary or administrative action.

[redacted], USN, CNAL [redacted], stated that an LOI is an administrative letter which identifies deficiencies and is normally used when personnel are not performing their jobs at the appropriate level. Additionally, the LOI recommends specific corrective actions to allow personnel to improve and, if personnel do not improve satisfactorily, the LOI can be used as a basis to request the member be detached for cause.

The U.S. Navy Military Personnel Manual 1611-020, "Officer Detachment for Cause," states that an LOI is formal command counseling and guidance that describes specific weaknesses, recommends suitable and reasonable measure for improvement, clearly establishes the desired performance standard, and, if appropriate, establishes the period of time for correction. LOIs must be delivered and acknowledged in writing at the time the officer is counseled. The fact that an LOI has been issued may be noted in a fitness report.

On May 9, 2018, the Complainant met with [redacted], but there was no mention of an LOI during their meeting. The Complainant provided us his notes from the May 9, 2018, meeting with [redacted], describing their conversation as:

- [redacted] questioned whether the Complainant was teaching material related to the CQ phase, which he was not qualified to teach;
- [redacted] and the Complainant discussed the Complainant's April 12, 2018, change request e-mail; and
- [redacted] questioned the Complainant about the contents of his online drive, the Complainant responded that it was material he had developed to help prepare for flights, and that he provided access to whomever asked for it. [redacted] asked to see a copy of the drive, or to have it taken down, and the Complainant responded he would have it taken down.

VFA-106 Command Investigation

[redacted], USN, CNAL [redacted], stated to us that in early April 2018, [redacted] sent [redacted] the *Peak Deliberate Practice.com* article and expressed concerns regarding the Complainant's interview used in the article. On or about April 4, 2018, [redacted] spoke to [redacted] and advised that [redacted] ([redacted]) was not concerned that the Complainant had spoken to the media, as the Complainant had stated in the article, "these are my personal feelings on the training of naval aviators," but was concerned with the Complainant discussing "teaching his own curriculum." [redacted] explained that [redacted] told [redacted] not to focus on the fact that the Complainant went to media without getting it vetted, "but you may want to look into this other area where [the Complainant's] teaching a curriculum that is not approved by the Navy."

On May 4, 2018, [redacted] and [redacted] met with [redacted] and [redacted] regarding concerns about the Complainant teaching non-standard curriculum after being told "a couple of times" not to do so. [redacted] explained to us that [redacted] and [redacted] requested "guidance on what our options are," and that they informed [redacted] ([redacted]) that none of the Complainant's counseling was documented. [redacted] explained to us that [redacted] recommendation to [redacted] and [redacted] was to start documentation, because "you want to be able to articulate your reasons" for any actions they might take. [redacted] told [redacted] and [redacted] they could consider an LOI to start documentation, and then monitor the Complainant's actions to ensure he complied. [redacted] also told them that if they felt an LOI was not going to be helpful, then they should start gathering evidence, and [redacted] recommended selecting a neutral third party to conduct a CDI. [redacted] explained to [redacted] and [redacted] that once a CDI

was complete, findings could be reviewed to figure out what the next steps would be. [redacted] believed they had sufficient evidence to "at least launch the investigation and go in and dig a little bit more," and after the May 4, 2018, meeting, [redacted] assigned [redacted] to provide legal representation so [redacted] could remain neutral in order to provide legal counsel for CNAL if the CDI was appealed.

When we asked [redacted] if [redacted] or [redacted] ever disclosed to [redacted] that the Complainant had initiated the bottle bets complaints, or assisted in the filing of multiple EO complaints, [redacted] stated, "No." When we asked [redacted] whether [redacted] would have altered [redacted] advice to [redacted] and [redacted] had [redacted] known the Complainant made protected communications, [redacted] stated, "No," and that [redacted] believed they had enough information at that point to launch an investigation.

[redacted] explained that [redacted] was considering issuing the Complainant an LOI, but [redacted] recommended a CDI because "you have a lot of suspicions, but you don't have a lot of evidence." [redacted] explained that the meeting occurred right after [redacted] DQ, and [redacted] mentioned that [redacted] had removed the Complainant's instructor duties because [redacted] was not sure if there was a connection between what the Complainant was teaching students and the recent CQ incidents; concerns the Complainant was teaching "unapproved un-vetted techniques" which could have contributed to the CQ incident; and that [redacted] stated that "I need it to stop" because [redacted] was uncertain whether it contributed to a potential mishap and that he was "afraid somebody is going to die." [redacted] explained that after they ([redacted] and [redacted]) recommended a CDI, [redacted] expressed concern that "if I do anything like this, I am going to get an IG or something else filed against me." [redacted] and [redacted] believed that no matter what they did, the Complainant would file another complaint. [redacted] stated they told [redacted] that if [redacted] had a "legitimate safety of flight concern," and would take the same action against someone who had not filed IG complaints or gone to the media, then they should do the investigation.

On May 14, 2018, [redacted] informed the Complainant that a CDI had been initiated into the Complainant's actions. The Complainant stated to us that [redacted] "vaguely" referenced the standardization issues that started in March with "no real specifics or anything." The Complainant explained that [redacted], [redacted], and [redacted] initiated and conducted a retaliatory CDI for "revenge," and to perpetuate the idea that he provided his non-standardized instruction, did not follow orders, and went "outside the chain of command." The Complainant believed the CDI was designed to manufacture a justification to remove him from flight status, pursue disciplinary action, and remove him from the Navy. The Complainant stated to us that [redacted] conducted a retaliatory CDI because, as [redacted], the Complainant's bottle bets IG complaint directly affected his community. The Complainant provided us with two examples of how [redacted] was manipulating the conduct of the CDI in a deliberate attempt to justify disciplinary action.

- Excluded Positive Statements About the Complainant. The Complainant stated that [redacted], USN, [redacted], contacted him and said [redacted] had contacted [redacted] (as the CDI IO) and was only seeking negative

information about him (the Complainant). The Complainant explained that [redacted] did not provide any negative information to [redacted], and [redacted] informed [redacted] "Well, I guess I won't be needing an official statement from you".

- Inappropriate Contact with Witnesses in Statement Preparation. The Complainant provided e-mail correspondence between [redacted] and a CDI witnesses, in which [redacted] included an example statement with language [redacted] wanted included, requesting the witnesses provide "something like this, put it in your own words from the experts." This e-mail correspondence included specific information [redacted] wanted included in the statements in order to "make my ([redacted]) point."

[redacted] stated to us that from May 14 through 16, 2018, [redacted] approached [redacted] to assist in crafting language for an LOI, and [redacted] asked [redacted] to conduct the CDI because [redacted] was the "logical fit for the investigation based on [redacted] expertise." [redacted] stated that they did not discuss any potential for bias on [redacted] ([redacted]) part, and [redacted] "exact statement" was, "I'm just trying to figure out what's going on," and "I really just want to get [the Complainant] back into flying production capacity."

From May 14 through 16, 2018, [redacted] sent e-mails to the [redacted] In the e-mails, [redacted] discussed [redacted] standardized LSO recommendation to "… at least align or create some consistency in our messaging," and to "Request your backing in case any of this comes up further."

On May 15, 2018, [redacted] e-mailed [redacted] a draft Preliminary Inquiry (PI) appointing order to investigate the Complainant's actions. The draft appointment order stated that the investigation was to inquire into the facts and circumstances surrounding the following issues.

- The dissemination of inappropriate information/techniques and use of non-standardized instructional methods to junior students and aircrew IRT [in relation to] landing onboard USS Ship. The scope of these techniques is not limited to only the CVN environment, but the VFA-106 F/A-18 FRS syllabus.
- The misuse of VFA-106 share drive information, and deliberate use of false impressions IOT [in order to] embarrass instructor cadre, create false impressions to former VFA-106 students, and misrepresent facts IRT racial bias within the unit to the media IOT further personal objectives, undermining the chain of command.
- The level, appropriateness and integration of the Complainant's relationship to junior students. Specifically, the use of his position as a future instructor, more experienced aviator and senior LT to further personal objectives, creating a non-graded evaluation system.

- Failure to inform, utilize, and allow the chain of command to address and solve problems.
- Not following orders when directed not to continue to instruct and interact with students.
- The deliberate allowance of the expiration of his personal SWIM PHYS [Aviation Physiology Training and Aviation Water Survival Training Program qualifications] IOT prevent being involved in Strike training onboard NAS Fallon, [Nevada].
- Allowing junior aircrew to be blamed, ridiculed and mistreated after deliberately filing an Inspector General Complaint.

On May 16, 2018, [redacted] sent [redacted] and [redacted] draft appointment order and requested to know if it was "inside [redacted] bounds," to deliver the appointment order. [redacted] May 16, 2018, draft appointment order removed paragraphs f. and g. from the appointment order that [redacted] initially provided.

From May 16 through 18, 2018, [redacted] coordinated via e-mail with [redacted], [redacted], and [redacted], USN, CNATRA [redacted] for language to be used in the appointing order. [redacted] recommended skipping the PI and proceeding directly to a CDI. On May 18, 2018, [redacted] informed [redacted] that [redacted] was initiating a CDI into the Complainant's actions. The final PI order document appointed CDR Roberts to conduct an investigation of the following potential violations.

- The dissemination of inappropriate information/techniques and use of non-standardized/reviewed instructional methods to junior students and aircrew IRT CAT-1 Carrier Qualification. The scope of your inquiry is not limited to only the CVN [carrier] environment, but also the VFA-106 F/A-18 FRS syllabus, and whether the instruction provided by [the Complainant] comports with the Naval Air Training and Operating Procedures Standardization.
- The misuse of VFA-106 share drive information and sharing inappropriate information for unauthorized purposes.
- The level, appropriateness and integration of [the Complainant's] relationship to junior students. Specifically, the use of his position as an instructor, more experienced aviator and senior lieutenant for inappropriate or unauthorized reasons, including, but not limited to, his contact with 17-4 student pilots and his alleged direct involvement in PRB discussions between a student and the PCO [prospective commanding officer].

On May 18, 2018, [redacted] notified [redacted] that [redacted] had delivered the appointing order for [redacted] ([redacted] to conduct the CDI at VFA-106.

From May 16, 2018, through July 12, 2018, [redacted] conducted multiple interviews with [redacted]. On May 21, 2018, [redacted] forwarded [redacted] the e-mail [redacted] had originally sent to [redacted] detailing the summary of [redacted] April 13, 2018, meeting with the Complainant. In [redacted] summary of the meeting, [redacted] wrote that the Complainant had spoken with Senator Warner's staff, and they had advised him (the Complainant) to bring the EO concerns to the media.

[redacted] stated to us that [redacted] was selected as the IO because [redacted] was "available," and a subject matter expert. [redacted] explained that as [redacted] was the ideal person to investigate non-standard techniques and procedures. [redacted] stated that [redacted] did not participate in any discussions with [redacted] that could potentially be biased due to the Complainant's reporting of bottle bets. [redacted] explained that they ([redacted], [redacted], and [redacted]) discussed the Complainant going to the IG, Congress, and the media, and they were expecting the CDI to trigger another complaint. [redacted] stated that [redacted] did not appear outcome-driven, but it became apparent [redacted] had developed a "more and more negative opinion of … [the Complainant]" as the investigation progressed. When we asked whether [redacted] was aware that evidence discovered during the course of our investigation indicated that [redacted] had influenced witness testimony, encouraged witness collusion, inappropriately shared CDI details with personnel who had no need to know, selectively excluded witness testimony, and disparaged the Complainant to personnel who could reasonably impact his future career or assignment, [redacted] stated, "That's concerning," and "No."

[redacted] stated to us [redacted] was "surprised" at [redacted]' selection as the CDI IO, because [redacted] was an LSO, and the Complainant's bottle bets complaints "called out" the LSO community and created animosity. [redacted] stated that [redacted] initial slant toward the investigation was that the Complainant was "guilty until proven innocent because of what he did [bottle bets complaints]."

On May 21, 2018, [redacted] e-mailed [redacted], USN, [redacted], that [redacted] ([redacted]) was appointed as "… the investigating officer into a 106 IP [the Complainant] who has been f*****g some s**t up in all our worlds." [redacted] wrote that "They needed a bullet-proof O-5 [redacted] willing to kamikaze this guy," and that [redacted] was "looking forward to it in a very weird way." When we asked [redacted] about [redacted] e-mail correspondence with [redacted], [redacted] stated, "We [redacted] and [redacted] never, ever said anything to those [*sic*] effect," Rather, [redacted] stated that [redacted] and [redacted] continually said, "I just want to get this resolved. I want to figure this out, and I want to get the kid flying again."

From May 22 through July 12, 2018, [redacted] interviewed 52 witnesses as part of the CDI. Our review of [redacted]' IO notes, interviews, and e-mail correspondence with interviewees indicated that [redacted] had substantive conversations with, or provided the LSO recommendation document to, interviewees prior to their interview date. From May 31 through July 10, 2018, [redacted] obtained 31 statements from witnesses as part of the CDI. Our review of [redacted]' IO notes, the 31 statements, and e-mail correspondence from [redacted] to witnesses indicated that [redacted] sent draft statements, the LSO recommendation document, and statements of other witnesses to witnesses being interviewed; and that [redacted] recommended including specific language in witnesses statements or recommended that they coordinate with other witnesses or personnel in the drafting of their statements. Our review of [redacted]' e-mail interactions with CDI witnesses and other personnel showed:

- approximately 30 instances of [redacted] sending witnesses and non-CDI personnel [redacted] personally prepared LSO recommendation document that stated the acceptable techniques for carrier landings, draft statements, previously submitted formal statements from other witnesses, or recommended language to include when soliciting formal statements from personnel for the CDI;
- instances of [redacted] recommending witnesses include language in their statements that "helps me substantiate," "…makes my case," "…lends further credence" to [redacted] recommendations, "…substantiate prior existing pattern of behavior," and "…prove my point.";
- instances of [redacted] disclosing to at least 20 witnesses or personnel the Complainant's filing of congressional and IG complaints, and communicating that there was a high probability the Complainant was going to file another complaint;
- [redacted] transmitting and receiving CDI information containing For Official Use Only (FOUO), Personally Identifiable Information (PII), Controlled but Unclassified, and Sensitive but Unclassified materials to or through private e-mail accounts of DoN civilian and military personnel;
- [redacted] excluding statements from the CDI for witnesses who provided affirmative testimony in support of the Complainant; most notably, [redacted] USN [redacted], who stated to us that [redacted] told [redacted] that, when [redacted] was assigned as an LSO at [redacted] with the Complainant, that [redacted] had worked extensively with the Complainant in developing his CQ training material, and that the VFA-131 chain of command was aware. [redacted] stated that [redacted] told him [redacted] didn't need a statement from [redacted] and that "[redacted] had pretty much gotten everything [redacted] needed or wanted for [redacted] investigation at that point.";
- [redacted] sending FOUO CDI details or evidence to military, DoN civilian, and non-DoD personnel who had no need to know;
- [redacted] requesting multiple "offline" conversations with senior naval personnel in positions that could influence the Complainant's career or future assignment about their awareness of the Complainant's reputation, or whether they would want him assigned to their squadron; and
- [redacted] referring to the Complainant by the nickname, "Evil Robin Hood" or "ERH."

We present charts of the witness interviews and statements obtained from witnesses in Appendix A of this report.

From May 23 through 29, 2018, [redacted] exchanged e-mails with [redacted] USN, [redacted] regarding the Complainant initiating multiple IG and congressional complaints, and the potential that the Complainant would file a reprisal allegation because of the CDI.

On May 24, 2018, [redacted] e-mailed [redacted] that [redacted] already had multiple lines of evidence that would justify recommending an FNAEB.

From June 11 through 12, 2018, [redacted] and [redacted] exchanged e-mails regarding the appropriateness of questions [redacted] was presenting to VFA-106 department heads. [redacted] advised [redacted] that, "These questions seem to be more about whether [the Complainant is] a dirtbag, than whether he's engaging in improper instructor practices with respect to teaching outside the syllabus, improper interactions with students, etc. I don't see the connection [with the appointing order]." [redacted] responded, "Thought less about it from the appointing order side than I did with making a case for FNAEB."

[redacted] stated to us that [redacted] and [redacted] discussed the Complainant's participation in the "... bottle bets, the article and stuff," and [redacted] did not indicate any bias, anger, or frustration with the Complainant being involved in these things. [redacted] explained [redacted] "didn't get the sense" that [redacted] was driving toward a particular outcome; rather, [redacted] "had an idea of where [redacted] thought [redacted] recommendations would go as a result of the information he was gathering." When we asked if [redacted] was aware that [redacted] had sent draft statements and previously provided witness statements to individuals and asked them to submit a statement for the investigation, [redacted] stated [redacted] was unaware [redacted] had done that.

On June 28, 2018, [redacted] interviewed the Complainant for the CDI regarding allegations the Complainant was "giving improper flight instruction." The Complainant stated to us that [redacted] informed him that he (the Complainant) was suspected of violating two articles of the Uniform Code of Military Justice; two counts of violating Article 92, "Failure to Obey a Lawful Order"; and one count of Article 134-96a, "Wrongful Interference with an Administrative Proceeding." The Complainant explained that [redacted] administered him his Article 31(b) rights, and he informed [redacted] that his attorney had advised him not to make any statements or answer any questions without his attorney being present, and the interview was terminated.

On July 2, 2018, [redacted] e-mailed a draft copy of the CDI report to [redacted].

On July 19, 2018, [redacted] e-mailed [redacted] a draft copy of the CDI from [redacted] personal e-mail account. In [redacted] e-mail, [redacted] stated, "Let the light at the end of the tunnel be a train. May this attachment be that train." In the draft CDI report, [redacted] opined that:

- the Complainant was aware that he was teaching in areas that he was not qualified to instruct;
- the Complainant's techniques were counter to standard operating procedures, fundamentally flawed, and posed a significant safety of flight issue;
- the Complainant had violated the direct orders of VFA-106 leadership and disregarded previous guidance to stop teaching velocity vector flying techniques;
- the Complainant had an unduly familiar relationship with, and abused his positional authority over, students; and
- the Complainant generated a general disregard for the chain of command and willingness to circumvent them in resolving perceived issues.

[redacted] recommended that:

- leadership address the impact to safety;
- the Complainant be charged with three violations of the Uniform Code of Military Justice;
- an assessment take place to determine whether further action regarding the Complainant's access to classified material or spaces was warranted;
- a Human Factors Board be conducted;
- a FNAEB be convened; and
- consideration be given to detaching the Complainant "For Cause."

VFA-106 provided data indicating that they conducted 12 other CDIs from August 2016 through August 2018. Of the 12 CDIs:

- three involved officers, one involved the Command Master Chief, and eight involved E-2 to E-7 personnel;
- three were conducted for EO allegations, and nine were conducted into allegations of misconduct;
- one misconduct allegation involved an officer and was substantiated; and
- one misconduct allegation was investigated in relation to workplace misconduct (maintenance malpractice against three E-5s), and was substantiated.

On October 30, 2018, we interviewed [redacted]. [redacted] stated to us that [redacted] was selected as the CDI IO because [redacted] was as [redacted], and an LSO subject matter expert on carrier landing performance. [redacted] stated to us that [redacted] reviewed the "JAGMAN [Department of the Navy Judge Advocate Instruction 5800.7F, "Manual of the Judge Advocate General,"]" and that [redacted] did not approach the CDI with any bias in terms of the facts. [redacted] explained to us [redacted] was aware of the Complainant's protected communications (bottle bets complaints) prior to his being appointed as the CDI IO, and stated that when [redacted] appointed [redacted] to conduct the CDI, [redacted] ([redacted]) informed [redacted] of removing the Complainant from instructing students due to concerns that [redacted] was teaching unauthorized syllabus material, particularly CQ. Prior to our conducting any questioning relating to [redacted] actions as the IO of the CDI, we administered [redacted] Article 31B rights and advised [redacted] that evidence collected during our investigation indicated [redacted] may have violated Uniform Code of Military Justice (UCMJ) Article 92, "Dereliction of Duty," and Article 133, "Conduct Unbecoming an Officer." After signing the Article 31B rights advisement form, [redacted] invoked [redacted] right to remain silent and the interview was terminated.

Unfavorable Fitness Report

On June 5, 2018, [redacted] issued the Complainant a fitness report (FITREP) for the period of performance covering February 1, 2018, through June 25, 2018, that did not contain [redacted] recommendation for the Complainant's selection for a VFA Operational Department Head

(VFA OP DH) milestone billet.[13] On two previous FITREPs, for periods of performance covering February 1, 2017, through January 31, 2018, and December 9, 2016, through January 31, 2017, [redacted] had recommended the Complainant's selection for VFA OP DH.

The Complainant stated that all his previous FITREPs had included a commanding officer's recommendation for department head, that [redacted] recommendations of "War College [Navy War College]," and "PG School" [Navy Postgraduate School] were not career enhancing, and that [redacted] was sending a message to the board that he (the Complainant) should not be selected for department head. The Complainant explained that without doing a department head tour, there was "no way I would ever be promoted to commander," or complete a full career as a naval aviator. The Complainant stated that when [redacted] debriefed him on his FITREP, [redacted] informed him (the Complainant) that it was a normal FITREP with normal progression, and that [redacted] did not address the fact that [redacted] was not recommending him for department head. The Complainant explained that unlike other lieutenants in the squadron, he was not scheduled for a FITREP debrief; rather, he received a text from [redacted] informing him to go to [redacted] office, and that CDR Sand was present for the duration of the debrief. The Complainant explained that normally there is no department head or witness present during a FITREP debrief.

[redacted] stated to us that [redacted] was at the Complainant's FITREP debrief with [redacted]. [redacted] explained that [redacted] asked [redacted] to be present because, beginning in April (2018), anytime they ([redacted] or [redacted]) wanted to talk with the Complainant, they wanted somebody else present so the Complainant could not misrepresent their words and publicize something that was not true. [redacted] explained that the FITREP debrief was "fairly short," and that [redacted] commended the Complainant's performance for his work on the change of command. [redacted] explained that [redacted] had submitted the Complainant's FITREP with a department head recommendation, and [redacted] ([redacted]) believed the Complainant's actions did not necessitate removing that department head recommendation. [redacted] stated to us that [redacted] believed the Complainant deserved to be a department head, and was not aware that they ([redacted] and [redacted]) had removed the Complainant's department head recommendation from his FITREP.

[redacted] provided us with the Complainant's proposed FITREP submission for the period ending June 25, 2018. On the FITREP that [redacted] submitted to [redacted], the Complainant's trait average was 4.00, the promotion recommendation was "Must Promote," and the FITREP contained recommendations for VFA Operational Department Head in Block 40, "Next Career Milestone," and block 41, "Comments on Performance."

The Complainant's VFA-106 FITREPs are shown in the table below, and reflect his three prior FITREPs all containing a recommendation for selection to VFA OP DH.

[13] Milestone billets are billets designated as a significant point of development that requires a candidate be screened for selection. The billets are selected based on the nature or complexity of the work or the scope of responsibility. In naval aviation, milestone billets are selection for Department Head (LCDR), selection for Command (CDR), and selection for Major Command (CAPT).

The Complainant's VFA-106 FITREP History

Period of Performance	Trait Average	Promotion Recommendation	Comments on Promotion and Milestone Tour
16SEP02 – 16DEC08	3.00	Promotable	Promote to LCDR / Select for VFA OP DH
16DEC09 – 17JAN31	3.00	Promotable	Promote to LCDR / Select for VFA OP DH
17FEB01 – 18JAN31	3.86	Promotable	Promote to LCDR / Select for VFA OP DH
18FEB01 – 18JUN25	4.00	Must Promote	Promote to LCDR

As shown in the table below, our analysis of [redacted] FITREP Summary Group for the period of performance ending June 25, 2018, indicated that of the 42 ranked FITREPs [redacted] signed, the Complainant's FITREP was the only one that did not contain a recommendation for Department Head. Additionally, we noted that 16 individuals were rated below the Complainant's trait average, but still were recommended for Department Head.

CDR Weyenberg's June 25, 2018 FITREP Summary Group

RK	NAME	TRAIT AVE	PROMO REC	O4 REC	DH REC	RK	NAME	TRAIT AVE	PROMO REC	O4 REC	DH REC
1	[redacted]	5.00	EP	Y	Y	23	[redacted]	4.14	MP	Y	Y
2	[redacted]	4.86	EP	Y	Y	24	[redacted]	4.14	MP	Y	Y
3	[redacted]	4.86	EP	Y	Y	25	[redacted]	4.14	MP	Y	Y
4	[redacted]	4.86	EP	Y	Y	26	Complainant	4.00	MP	Y	N
5	[redacted]	4.71	EP	Y	Y	27	[redacted]	4.00	P	Y	Y
6	[redacted]	4.71	EP	Y	Y	28	[redacted]	3.86	P	Y	Y
7	[redacted]	4.71	EP	Y	Y	29	[redacted]	3.71	P	Y	Y
8	[redacted]	4.57	EP	Y	Y	30	[redacted]	3.71	P	Y	Y
9	[redacted]	4.57	EP	Y	Y	31	[redacted]	3.57	P	Y	Y
10	[redacted]	4.57	MP	Y	Y	32	[redacted]	3.57	P	Y	Y
11	[redacted]	4.57	MP	Y	Y	33	[redacted]	3.43	P	Y	Y
12	[redacted]	4.57	MP	Y	Y	34	[redacted]	3.43	P	Y	Y
13	[redacted]	4.57	MP	Y	Y	35	[redacted]	3.29	P	Y	Y
14	[redacted]	4.43	MP	Y	Y	36	[redacted]	3.29	P	Y	Y
15	[redacted]	4.43	MP	Y	Y	37	[redacted]	3.14	P	Y	Y
16	[redacted]	4.43	MP	Y	Y	38	[redacted]	3.14	P	Y	Y
17	[redacted]	4.29	MP	Y	Y	39	[redacted]	3.14	P	Y	Y
18	[redacted]	4.29	MP	Y	Y	40	[redacted]	3.00	P	Y	Y
19	[redacted]	4.14	MP	Y	Y	41	[redacted]	3.00	P	Y	Y
20	[redacted]	4.14	MP	Y	Y	42	[redacted]	3.00	P	Y	Y
21	[redacted]	4.14	MP	Y	Y	43	[redacted]	0.00	NOB	NOB	NOB
22	[redacted]	4.14	MP	Y	Y						

The Bureau of Naval Personnel (BUPERS) Instruction 1610.10D, "Navy Performance Evaluation System," states that, with regard to career recommendations, "the first recommendation should be for [the officer's] next significant career milestone, and should be useful to detailers and screening boards." Additionally, BUPERSINST 1610.D states that, in the comment section of the FITREP, "notes on future potential aid in administrative board proceedings and are appropriate."

VI. ANALYSIS

In order to determine whether a complainant was subjected to reprisal under 10 U.S.C. 1034, the complainant must have engaged in a protected communication; the

responsible management official(s) must have had knowledge of the protected communication; the complainant was subjected to a personnel action that was taken, threatened, or withheld; and a causal connection exists between the protected communication and the personnel action. The causal connection is resolved by answering the question in Paragraph D, below. If the evidence does not establish that the personnel action would have been taken, threatened, or withheld absent the protected communication, then the complaint is substantiated. Conversely, if the evidence establishes that the personnel action would have been taken, threatened, or withheld absent the protected communication, then the complaint is not substantiated. Below, we analyze each of the elements.

A. Did the Complainant make or prepare to make a protected communication, or was the Complainant perceived as having made a protected communication?

We determined the Complainant made 11 protected communications under 10 U.S.C. 1034: one each to the DoD OIG, USFF IG, CNAL IG and NAVINSGEN; two to a Member of Congress; one to his chain of command; two in assisting in an investigation related to a protected communication; and two by participating in or otherwise assisting in filing an action under 10 U.S.C. 1034(b). The Complainant was perceived as whistleblower in May 2018, and made one communication that was not protected under 10 U.S.C. 1034.

April 2017, Participating in VFA-106 EO Preliminary Inquiry – Yes

[redacted] interviewed the Complainant as part of a VFA-106 PI into [redacted] allegation of EO discrimination related to unfair grading practices by VFA-106 IPs. Under 10 U.S.C. 1034(b)(1)(C), in order for the Complainant's interview to qualify as a protected communication, we first must determine whether he was participating in or assisting in an investigation or proceeding related to a protected communication. As a result, we must first determine whether [redacted] disclosed information that [redacted] reasonably believed constituted evidence of unlawful discrimination. For the following reasons, we have determined that [redacted] had a reasonable belief that he was subjected to unlawful discrimination.

- [redacted] reported to [redacted] that VFA-106 personnel had discriminated against [redacted] and were attempting to remove [redacted] from training based on [redacted] race, and provided evidence to [redacted] that potentially indicated [redacted] was graded in a disparate manner when compared to non-African American student pilots.
- [redacted] allegations could constitute a violation of Title VII of the Civil Rights Act of 1964 and DOD Directive 1350.02, "Department of Defense Military Equal Opportunity Program."
- [redacted], as the VFA-106 [redacted], is an official in his chain of command authorized to receive disclosures. Therefore, we conclude that [redacted] made a protected communication. Providing testimony, or otherwise participating in or assisting in an investigation or proceeding related to a protected communication, such as a protected communication alleging unlawful discrimination, is protected under 10 U.S.C. 1034(b)(1)(C). Therefore, the

Complainant's interview by [redacted] qualified as a protected communication.

July 2017, Assisting [redacted] in Filing Congressional EO Complaint with Senator Warner's Office – Yes

The Complainant assisted [redacted] in preparing and filing an EO complaint to Senator Warner's office alleging that VFA-106 IPs were racially biased and discriminating against African American replacement pilots. We are not aware of any evidence suggesting this was an unlawful communication. Making or preparing to make any lawful communication to a Member of Congress is a protected communication under 10 U.S.C. 1034(b)(1)(A).

September-October 2017, Followup Communications with Senator Warner's Staff – Yes

The Complainant made followup communications with members of Senator Warner's staff relating to [redacted] EO complaint. We are not aware of any evidence suggesting these were unlawful communications. Making or preparing to make any lawful communication to a Member of Congress is a protected communication under 10 U.S.C. 1034(b)(1)(A).

November 2017, USFF IG Bottle Bets Complaint – Yes

The Complainant made a USFF IG complaint that LSO instructors conducted improper bottle bets wagers with students in violation of 5 C.F.R. Section 2635.301, and the Joint Ethics Regulation. We are not aware of any evidence suggesting this was an unlawful communication. Making or preparing to make any lawful communication to an IG is a protected communication under 10 U.S.C. 1034(b)(1)(A).

November 2017, Followup Communications with the CNAL IG – Yes

The Complainant exchanged e-mails with the CNAL IG regarding the USFF IG's mishandling of his complaint, and provided CNAL IG text messages indicating that his IG complaint was widely disseminated. We are not aware of any evidence suggesting this was an unlawful communication. Making or preparing to make any lawful communication to an IG is a protected communication under 10 U.S.C. 1034(b)(1)(A).

December 2017, Assisting [redacted] and [redacted] with USFF EO Complaint – Yes

The Complainant assisted [redacted] and [redacted] in filing EO complaints with the USFF EO Office alleging that [redacted] violated DoN EO policies. The Complainant assisted in editing and submitting their complaints, and provided chat screenshots of comments indicating negative attitudes toward minorities. Under 10 U.S.C. 1034(b)(1)(C), in order for the Complainant's assistance to qualify as a protected communication, we first must determine whether his assistance constituted filing, causing to be filed, participating in, or otherwise assisting in an action related to a protected communication. As a result, we must first determine whether [redacted] and [redacted] disclosed information that they reasonably believed constituted evidence of unlawful discrimination. [redacted] and [redacted] USFF EO

complaints alleged that current and former VFA-106 personnel had discriminated against them through unfair grading practices that resulted in their removal from training. The complaints contained evidence that potentially indicated they were graded in a disparate manner when compared to non-African American student pilots, and screenshots from IP WhatsApp chats that indicated racial basis on the part of VFA-106 IPs. Additionally, the USFF accepted [redacted] and [redacted] complaints, and initiated an investigation into their allegations. For these reasons, we determined that [redacted] and [redacted] had a reasonable belief that they were subject to unlawful discrimination and racial bias in violation of Title VII of the Civil Rights Act of 1964 and DoD Directive 1350.02. Therefore, we conclude that [redacted] and [redacted] made protected communications, and that the Complainant assisted them in making those protected communications. Filing, causing to be filed, participating in, or otherwise assisting in an action related to a protected communication is protected under 10 U.S.C. 1034(b)(1)(C).

December 2017, Filing Bottle Bets Congressional Complaint with Senator Warner's Office – Yes

The Complainant made a complaint to Senator Warner's office that across naval aviation, IPs were "illegally accepting, and sometimes demanding through social pressure and coercion, exorbitant gifts from subordinates in the form of bottles of alcohol [bottle bets]." The Complainant also included his November 2017 USFF IG complaint, and detailed no action being taken to stop an activity that was "illegal and prohibited by federal law." We are not aware of any evidence suggesting this was an unlawful communication. Making or preparing to make any lawful communication to a Member of Congress is a protected communication under 10 U.S.C. 1034(b)(1)(A).

February-March 2018, Followup Communications with NAVINSGEN and USFF IG – Yes

The Complainant provided NAVINSGEN with additional information regarding bottle bets (spreadsheets from a recent CQ indicating 11 students owed 82 bottles of alcohol), and on NAVINSGEN's forwarding of the Complainant's concerns to the USFF IG for action, the Complainant provided the USFF IG clarification regarding the additional information. We are not aware of any evidence suggesting this was an unlawful communication. Making or preparing to make any lawful communication to an IG is a protected communication under 10 U.S.C. 1034(b)(1)(A).

April 5, 2018, Conversations with [redacted] – No

On April 5, 2018, the Complainant and [redacted] discussed the Complainant's rationale for participating in the *Military.com* article, where [redacted] stated "a lot of people were really upset about the article's content, but that they would get over it eventually." The notes the Complainant provided us of the April 5, 2018, phone conversation with [redacted] detailed that:

- the Complainant told [redacted] he assisted [redacted] and [redacted] with their EO complaints for over a year;

- a member of Senator Warner's staff recommended they take the issue to the "press"; and
- the Complainant did not inform [redacted] about participating in the article prior to publication because he (the Complainant) believed he was not supposed to discuss the matter with personnel under investigation.

Additionally, when we asked the Complainant whether, during the April 5, 2018, phone conversation with [redacted], he made any allegations that racial bias or discrimination were ongoing at VFA-106, the Complainant stated, "No, I just mentioned that I had been working with [redacted] and [redacted] the last year, and that I was involved [in the EO complaints]." As the contemporaneous notes the Complainant provided do not indicate, and the Complainant asserted to us that he did not make any allegations that racial bias and discrimination had occurred, we determined it is more likely than not the Complainant did not report a violation of law, rule or regulation, or abuse of authority to [redacted], and his communication with [redacted] is not protected under 10 U.S.C. 1034.

April 12, 2018, Change Request Alleging Ostracism and Retaliation – Yes

On April 12, 2018, the Complainant e-mailed change requests to all VFA-106 IPs, to include his chain of command, that discussed the practice of bottle bets, and stated "The kind of ostracism and retaliation I have received for reporting institutionalized illegal behavior [bottle bets], such as being recommended to a mental health evaluation, send a very clear message that anyone who attempts to improve or change the organization for the better will be met with extreme negative and potentially career-ending consequences." Although the Complainant incorrectly believed he had been recommended to a mental health evaluation, and as a result believed he had been retaliated against at that time, the Complainant does not have to be correct that a violation of a law, rule, or regulation occurred provided that the Complainant's belief is reasonable. The reasonable belief test is objective, not subjective, and is based on whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the Complainant could reasonably conclude that there was a violation of a law, rule, or regulation.

From March 15 through April 5, 2018, the Complainant had been:

- counseled by [redacted] that there was widespread speculation he had initiated the bottle bets complaint which resulted in trust issues and a rift within the squadron;
- confronted by [redacted] and [redacted] about trust issues, reporting matters outside the chain of command, and questioned as to whether he had initiated the bottle bets complaints; and
- disclosed to [redacted] that he had been assisting [redacted] and [redacted] file multiple EO complaints.

Further, on April 12, 2018, [redacted] erroneously told the Complainant that the meeting with [redacted] and [redacted] was related to concerns with his "mental state," and on April 16, 2018, the Complainant specifically asked [redacted] for the results

of his mental health evaluation. Considering the short period of time between the Complainant's protected communications, discussions with [redacted] and [redacted] about some of those communications, and the alleged mental health evaluation recommendation, a reasonable person with knowledge of the essential facts known to and readily ascertainable by the Complainant on the date he sent the change request e-mail (April 12, 2018), would have reasonably concluded that the actions alleged constituted retaliation. Therefore, the Complainant's report to his chain of command that he had been reprised against for making protected communications is a protected communication under 10 U.S.C. 1034(b)(1)(B).

May 11, 2018, Interview for USFF EO Complaint – Yes

[redacted] interviewed the Complainant as part of the USFF EO investigation into [redacted] and [redacted] EO complaints. As previously discussed, we determined that [redacted] and [redacted] made protected communications through their report of unlawful discrimination and racial bias in violation of Title VII of the Civil Rights Act of 1964 and DoD Directive 1350.02 to the USFF EO office, and that the USFF had initiated an investigation into their report. Providing testimony, or otherwise participating in or assisting in an investigation or proceeding related to a protected communication is protected under 10 U.S.C. 1034(b)(1)(C).

May 13, 2018, DoD OIG Hotline Reprisal Complaint – Yes

The Complainant filed a complaint with the DoD Hotline that he was reprised against for making the previously discussed protected communications. We are not aware of any evidence suggesting this was an unlawful communication. Making or preparing to make any lawful communication to an IG is a protected communication under 10 U.S.C. 1034(b)(1)(A).

May 2018, Complainant Perceived as a Whistleblower – Yes

In the May 4, 2018 meeting between [redacted], [redacted], [redacted], and [redacted], they discussed the Complainant's previous IG and congressional complaints, and that they ([redacted] and [redacted]) believed that no matter what action they took, the Complainant would file another complaint. Additionally, [redacted] stated to us that [redacted] believed that by the time they initiated the CDI, it was a foregone conclusion that the Complainant would file another IG complaint. Moreover, [redacted] stated to us that beginning in May 2018, based on the Complainant's past actions, [redacted] had a "gut feeling" the Complainant would file an IG complaint because of the command investigations and stated that, during the CDI [redacted] conducted, [redacted] notified numerous witnesses that the Complainant had established a "pattern of behavior going outside the lifelines [media articles, IG, and congressional complaints]." Lastly, [redacted] told us that everyone at VFA-106 (to include [redacted] and [redacted]) felt that taking any action against the Complainant would result in his filing another IG complaint. Therefore, we determined by a preponderance of the evidence that in May 2018, [redacted], [redacted], [redacted], and [redacted] perceived the Complainant as a whistleblower.

As described above, a preponderance of the evidence established the Complainant made 11 protected communications, and was further perceived as a whistleblower under 10 U.S.C. 1034.

B. Was an unfavorable personnel action taken or threatened against the Complainant, or was a favorable personnel action withheld or threatened to be withheld from the Complainant?

We determined the Complainant was the subject of four unfavorable personnel actions under 10 U.S.C. 1034, as defined by DoDD 7050.06, and that one action did not qualify as a personnel action.

Removal of Instructional Duties – Yes

On May 3, 2018, [redacted] and [redacted] removed the Complainant from instructional duties. As the Complainant was assigned to VFA-106 as an instructor, the removal of his instructional duties was a significant change in duties, inconsistent with his grade, which could impact his ability to compete favorably against his peers on fitness reports and impact his promotion potential, ability to screen for milestone billets, and selection for future assignments. Therefore, the removal of the Complainant's instructional duties qualifies as a personnel action under 10 U.S.C. 1034, as defined by DoDD 7050.06.

Reassignment from Legal Officer Position to Assistant Administration Officer Position – No

On May 4, 2018, [redacted] and [redacted] reassigned the Complainant from his position as legal officer to the assistant administration officer position. VFA-106 legal officers normally serve in that position for 9 months, and the Complainant was in the legal officer position for 17 months. [redacted] recommended to [redacted] and [redacted] to move the Complainant to the assistant administration officer position because moving him from being one of three legal officers assigned to the Administration Department to being the Assistant Administration Officer with oversight of the entire Administration Department would represent a promotion in duties and responsibilities for the Complainant. Additionally, [redacted] stated that [redacted] assigned the Complainant as the overall change of command coordinator, responsible for overseeing the lieutenants who were planning and executing the change of command, and as the SharePoint Administrator responsible for overseeing the update of the VFA-106 SharePoint website. [redacted] stated that assistant department head positions are normally staffed by lieutenant commanders, and the Complainant filling the position would allow him to compete favorably on fitness reports. Additionally, we found insufficient evidence that the duties and responsibilities of the assistant administration officer were not commensurate with the Complainant's grade or rank. Given that the Complainant was due for rotation from the legal officer position, and the [redacted] and [redacted] stated the assistant administration officer position was not a demotion, but a promotion in responsibilities which would allow him to compete favorably on fitness reports, we determined the Complainant's reassignment was not a significant change in duties or responsibilities inconsistent with his grade, and therefore does not qualify as a personnel action under 10 U.S.C. 1034, as defined by DoDD 7050.06.

Threatened with Disciplinary Action – Yes

On May 7, 2018, according to the Complainant, [redacted] told the Complainant that [redacted] intended to issue him an LOI, and if he (the Complainant) did not accept the LOI a CDI would be initiated. As [redacted] invoked [redacted] right to remain silent and did not provide any substantive testimony or statement in this matter, we found the Complainant's recollection of the May 7, 2018, conversation to be credible because it was contemporaneously articulated in his May 13, 2018, DoD Hotline complaint. Further, the evidence shows that during this time period, [redacted] discussed with [redacted] the potential for issuing the Complainant an LOI or initiating a CDI. Absent any testimony from [redacted] and based on the wording of the statement, we determined that [redacted] statement to the Complainant constituted an implied threat of disciplinary or corrective action. Threatening to take unfavorable disciplinary or corrective action qualifies as a personnel action under 10 U.S.C. 1034, as defined by DoDD 7050.06.

VFA-106 Command Investigation – Yes

On May 15, 2018, [redacted] submitted a draft appointment order that requested the conduct and scope of a VFA-106 CDI, and on May 18, 2018, [redacted] initiated the CDI and appointed [redacted] to conduct the CDI as the IO. The Complainant believed [redacted] requested, [redacted] initiated, and [redacted] conducted a retaliatory CDI for "revenge," and to perpetuate an idea that the Complainant was not standardized, did not follow orders, and went "outside the chain of command" in order to manufacture justification to remove him from flight status, pursue disciplinary action, and remove him from the Navy.

Our review of [redacted] draft appointment order indicated that three of the seven matters recommended for investigation directly pertained to the Complainant's protected communications. When [redacted] received the draft appointment order from [redacted], [redacted] made minor edits, forwarded it to the SJAs, and requested to know if it was "inside [redacted] bounds" to deliver the appointment order. Our review of [redacted] draft appointment order indicated that two of the five matters recommended for investigation directly pertained to the Complainant's protected communications, as these two matters involved the Complainant failing to use the chain of command to address issues. Additionally, on May 21, 2018, [redacted] e-mailed [redacted] that he had been appointed as the investigating officer because, "They needed a bullet-proof O-5 [redacted] willing to kamikaze this guy [the Complainant]," and that [redacted] was "looking forward to it in a very weird way." We determined that [redacted]' use of the term "they" more likely than not referred to [redacted] and [redacted], as they were the cognizant authorities who requested and initiated the investigation. Additionally, we determined that [redacted] use of the language "willing to kamikaze," and "looking forward to it," more likely than not indicated that the CDI's primary purpose, as directed by [redacted] and [redacted], was to punish, harass, and justify a pre-determined unfavorable outcome for the Complainant. Further, [redacted] expressed [redacted] surprise to us that [redacted], an LSO, had been selected by [redacted] to conduct an investigation of the individual who filed the bottle bets complaints and "called out" the LSO community. Therefore, we determined that the VFA-106 CDI was requested, initiated, and conducted as a retaliatory investigation. An investigation requested, directed, initiated, or

conducted for the primary purpose of punishing, harassing, or ostracizing a member of the Armed Forces for making a protected communication qualifies as a personnel action under 10 U.S.C. 1034.

Unfavorable Fitness Report – Yes

On June 5, 2018, [redacted] issued the Complainant a FITREP for the period of performance from February 1 through June 25, 2018. While the Complainant's trait average increased from 3.86 to 4.00 and his promotion recommendation increased from "Promote" to "Must Promote," unlike the Complainant's previous FITREPs, [redacted] did not recommend the Complainant for selection to an Operational VFA Department Head milestone billet. Lacking the CO's endorsement for selection to Operational VFA Department Head could result in the Complainant failing to screen for his department head milestone tour, which would significantly impact his future promotion potential and viability for future career assignments. Therefore, although we determined that the Complainant's FITREP had some favorable aspects, [redacted] removal of [redacted] endorsement for the Complainant's selection to an Operational VFA Department Head milestone billet on June 5, 2018, qualifies as an unfavorable personnel action under 10 U.S.C. 1034, as defined by DoDD 7050.06.

As described above, a preponderance of the evidence established the Complainant was subjected to four personnel actions as defined by 10 U.S.C. 1034.

C. Did the responsible management official(s) have knowledge of the Complainant's protected communication(s) or perceive the Complainant as making or preparing protected communication(s)?

We determined that [redacted] and [redacted] had knowledge of seven of the Complainant's protected communications, and perceived that the Complainant made four additional protected communications by participating in the IG and USFF EO investigations, and that the Complainant would file additional IG complaints. We also determined that [redacted] had knowledge of six of the Complainant's protected communications, and perceived the Complainant made four additional protected communications by participating in the IG and USFF EO investigations, and that the Complainant would file additional IG complaints.

We determined that the Complainant made 11 protected communications that fell in four categories: participation in the April 2017 PI; assistance in filing EO complaints (congressional and USFF) and subsequent followup communications or investigation; filing bottle bets complaints (USFF and congressional) and subsequent followup communication; and filing reprisal complaints (chain of command and DoD OIG). Below, we summarize the findings of the responsible management officials' knowledge of the Complainant's protected communications.

[redacted] *Knowledge of the Complainant's Protected Communications*

Participating in VFA-106 EO Preliminary Inquiry (PI) – Yes

On April 28, 2017, [redacted] submitted [redacted] PI findings, which noted the Complainant's PI interview, to [redacted]. Therefore, based on a preponderance of the evidence, we determined that on April 28, 2017, [redacted] had knowledge of the Complainant's PI interview, and [redacted] participation in the following actions.

Assistance in Filing EO Complaints and Followup Communications or Investigation

- Assisting [redacted] in filing a congressional EO complaint – yes
- Communications with Senator Warner's staff – yes
- Assisting [redacted] and [redacted] in filing USFF EO Complaint – yes
- Interview for USFF EO investigation – yes (perceived)

On January 11, 2018, [redacted] informed [redacted] that CNAP was investigating allegations of racial bias at VFA-106. On April 4, 2018, the Complainant was quoted in a *Military.com* article on racial bias. The Complainant's contemporaneous notes indicate that on April 5, 2018, he informed [redacted] that he had been assisting [redacted] and [redacted] with their EO complaints for over a year, and Senator Warner's staff had recommended that they take the matter to the press. Accordingly, we determined, based on a preponderance of the evidence, that on April 5, 2018, [redacted] had knowledge that the Complainant had assisted in the filing of EO complaints (Senator Warner and USFF EO) and that the Complainant had discussions with Senator Warner's staff. We further determined by a preponderance of the evidence that [redacted] would have perceived that the Complainant also participated in the USFF EO investigation.

Filing Bottle Bets Complaints and Followup Communication

- November 2017, USFF IG bottle bets complaint – yes
- November 2017, followup with the USFF IG – yes (perceived)
- December 2017, filing bottle bets congressional complaint, Senator Warner – yes
- February-March 2018, followup with NAVINSGEN and USFF IG – yes (perceived)

In November 2017, [redacted] notified [redacted] about the USFF bottle bets IG complaint, and [redacted] further notified [redacted] and the VFA-106 LSOs. [redacted] stated that in January or February 2018, "leadership" informed [redacted] that the complaint was elevated to the congressional level. We determined that it was more likely than not that "leadership" also informed [redacted] that the complaint had been elevated. On March 20, 2018, [redacted], at the request of [redacted], met with the Complainant to clarify the Complainant had initiated the bottle bets complaints. Given that [redacted] asked the Complainant directly, and the Complainant responded in the affirmative, we determined it is more likely than not that [redacted] then informed [redacted] of the Complainant's answer and, as the [redacted] would have informed [redacted] that the Complainant had

admitted he was the initiator of the bottle bets complaint. As such, we determined by a preponderance of the evidence that on March 20, 2018, [redacted] had knowledge that the Complainant had initiated the bottle bets complaints (USFF IG and congressional). We further determined by a preponderance of the evidence that it is also more likely than not, that on or about March 20, 2018, [redacted] perceived that the Complainant would have participated in any followup communications.

Filing Reprisal Complaints (Chain of Command and DoD OIG)

- April 2018, change request reprisal and retaliation – yes
- May 2018, filing DoD OIG Hotline reprisal complaint – yes (perceived)

[redacted] was a direct recipient of the Complainant's change request e-mail that alleged reprisal for making protected communications, and [redacted] sent the Complainant's e-mail to [redacted] personal e-mail account. As such, we determined by a preponderance of the evidence that [redacted] was aware of the Complainant's protected communication.

On May 4, 2018, [redacted] and [redacted] told [redacted] and [redacted] that they believed that no matter what action they took in response to their concerns about the Complainant's instructional practices, the Complainant would file another complaint (IG or congressional). Given that on May 4, 2018, [redacted] told [redacted] and [redacted] the Complainant would inevitably file another IG complaint, we determined by a preponderance of the evidence that on May 4, 2018, [redacted] perceived the Complainant would file an additional IG complaint.

[redacted] *Knowledge of the Complainant's Protected Communications*

- Participating in VFA-106 EO Preliminary Inquiry (PI) – Yes

On April 28, 2017, [redacted] submitted his PI findings to [redacted], via [redacted], which noted the Complainant's PI interview. Therefore, based on a preponderance of the evidence, we determined that on April 28, 2017, [redacted] had knowledge of the Complainant's PI interview and his participation in the following actions.

Assistance in Filing EO Complaints and Followup Communications or Investigation

- Assisting [redacted] in filing congressional EO complaint – yes
- Communications with Senator Warner's staff – yes
- Assisting [redacted] and [redacted] in filing USFF EO complaint – yes
- Interview for USFF EO investigation – yes (perceived)

On January 11, 2018, [redacted] informed [redacted] that CNAP was investigating allegations of racial bias at VFA-106. On April 4, 2018, the Complainant was quoted in a *Military.com* article on racial bias. The Complainant's contemporaneous notes indicate that on April 5, 2018, he informed [redacted] that he had been assisting [redacted] and

[redacted] with their EO complaints for over a year, and Senator Warner's staff had recommended that they take the matter to the press. As [redacted] was [redacted] and the Complainant's appearance in the article became a topic of widespread discussion at VFA-106, we determined that it was more likely than not that [redacted] would have informed [redacted] of [redacted] conversation with the Complainant. Accordingly we determined, based on a preponderance of the evidence, that on or about April 5, 2018, [redacted] had knowledge that the Complainant had assisted in the filing of EO complaints (Senator Warner and USFF EO) and that the Complainant had conducted discussions with Senator Warner's staff. We further determined by a preponderance of the evidence that [redacted] would have perceived that the Complainant also participated in the USFF EO investigation.

Filing Bottle Bets Complaints and Followup Communication

- November 2017, USFF IG bottle bets complaint – yes
- November 2017, followup with the USFF IG – yes (perceived)
- December 2017, filing bottle bets congressional complaint with Senator Warner – yes
- February-March 2018, followup with NAVINSGEN and USFF IG – yes (perceived)

In November 2017, [redacted] was aware of the USFF bottle bets IG complaint. [redacted] stated that in January or February 2018, "leadership" informed [redacted] that the complaint was elevated to the congressional level. We determined that it was more likely than not that "leadership" also informed [redacted] and [redacted] that the complaint had been elevated. On March 20, 2018, [redacted] at the request of [redacted], met with the Complainant to clarify the Complainant had initiated the bottle bets complaints. Given that [redacted] asked the Complainant directly, and the Complainant responded in the affirmative, we determined it is more likely than not that [redacted] then informed [redacted] of the Complainant's answer. As such, we determined by a preponderance of the evidence that on March 20, 2018, [redacted] had knowledge that the Complainant had initiated the bottle bets complaints (USFF IG and congressional). As such, we further determined by a preponderance of the evidence that it is also more likely than not, that on or about March 20, 2018, [redacted] perceived that the Complainant would have participated in any followup communications.

Filing Reprisal Complaints (Chain of Command and DoD OIG)

- April 2018, change request reprisal and retaliation – yes
- May 2018, filing DoD OIG Hotline reprisal complaint – yes (perceived)

[redacted] was a direct recipient of the Complainant's change request e-mail that alleged reprisal for making protected communications. As such, we determined by a preponderance of the evidence that [redacted] was aware of the Complainant's protected communication.

We considered the previously discussed meeting in which [redacted] and [redacted] met with [redacted] and [redacted] and discussed their beliefs that the

Complainant would file another complaint. Given [redacted] position as [redacted] we determined it is more likely than not that [redacted] or [redacted] discussed their beliefs with [redacted] that the Complainant would initiate another IG complaint. Additionally, given that [redacted] told us that everyone at VFA-106 believed that taking any action against the Complainant would result in his filing another IG complaint, we determined by a preponderance of the evidence that on or about May 4, 2018, [redacted] perceived the Complainant would initiate another IG complaint.

[redacted] *Knowledge of Complainant's Protected Communications*

- Participating in VFA-106 EO Preliminary Inquiry (PI) – No

The PI was a local VFA-106 inquiry into EO allegations that concluded with no subsequent action. Our review of the evidence and testimony did not reveal any instances in which [redacted] participated in any discussions regarding the Complainant's involvement in the PI. As such, we determined it is more likely than not that [redacted] lacked knowledge of the Complainant's PI interview.

Assistance in Filing EO Complaints and Followup Communications or Investigation

- Assisting [redacted] in filing congressional EO complaint – yes
- Communications with Senator Warner's staff – yes
- Assisting [redacted] and [redacted] in filing USFF EO complaint – yes
- Interview for USFF EO investigation – yes (perceived)

[redacted] stated that he acquired [redacted] knowledge regarding the Complainant's assistance with [redacted] and [redacted] EO complaints from the *Military.com* article. The article cited that [redacted] filed a complaint with Senator Warner's office, and that the Complainant supported [redacted] claim that [redacted] was separated due to racial bias. Additionally, beginning on May 16, 2018, [redacted] conducted multiple interviews with [redacted], and on May 21, 2018, [redacted] sent [redacted] the April 13, 2018 summary of [redacted] meeting with the Complainant. In the summary of the meeting, [redacted] wrote that the Complainant met with Senator Warner's staff and that they recommended that the EO issues be brought to the media. As the article cited that [redacted] filed a complaint with Senator Warner's office, and [redacted] summary cited that the Complainant met with Senator Warner's staff, we determined by a preponderance of evidence that between May 16, 2018, and May 21, 2018, [redacted] became aware that the Complainant had assisted in the filing of EO complaints (congressional and USFF EO) and that the Complainant had conducted discussions with Senator Warner's staff. We further determined by a preponderance of the evidence that [redacted] would have perceived that the Complainant would have also participated in the subsequent USFF EO investigation.

Filing Bottle Bets Complaints and Followup Communication

- November 2017, USFF IG bottle bets complaint – yes
- November 2017, followup with the USFF IG – yes (perceived)

- December 2017, filing bottle bets congressional complaint with Senator Warner – yes
- February-March 2018, followup with NAVINSGEN and USFF IG – yes (perceived)

[redacted] stated that in fall 2017, [redacted] told [redacted] about the bottle bets IG complaint and that in January or February 2018, "leadership" informed [redacted] ([redacted]) that the bottle bets complaint was elevated to the congressional level. [redacted] stated to us that in January or February 2018, the Complainant self-identified to [redacted] as the initiator of the bottle bets complaint. As such, we determined by a preponderance of the evidence that in January or February 2018, [redacted] was aware that the Complainant had initiated the bottle bets complaint. As such, we determined by a preponderance of the evidence that it is also more likely than not, that in the January through February 2018 timeframe, [redacted] perceived that the Complainant would have participated in any follow-up communications.

Filing Reprisal Complaints (Chain of Command and DoD OIG)

- April 2018, change request reprisal and retaliation – yes
- May 2018, filed DoD OIG Hotline reprisal complaint – yes (perceived)

[redacted] received the Complainant's April 12, 2018, e-mail as part of the CDI lines of evidence. E-mail records indicate that on July 8, 2018, [redacted], USN, VFA-106 [redacted], sent [redacted] the Complainant's April 12, 2018, e-mail with attached change requests. As such, we determined by a preponderance of the evidence that on July 8, 2018, [redacted] was aware of the Complainant's protected communication.

[redacted] stated that due to the CDI, [redacted] had a "gut feeling" the Complainant would file an IG Complaint, and [redacted] notified numerous witnesses during the CDI that the Complainant had a pattern of behavior of filing IG complaints. As such, we determined, based on a preponderance of the evidence, that on or about May 18, 2018 (the CDI initiation date), [redacted] perceived the Complainant would file an additional IG complaint.

D. Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)?

We determined that [redacted] and [redacted] would have removed the Complainant's instructional duties absent his protected communications. Additionally, we determined that [redacted] would not have requested the conduct and scope of the CDI, [redacted] would not have initiated, and [redacted] would not have conducted a retaliatory CDI, and that [redacted] would not have issued the Complainant an unfavorable FITREP, absent the Complainant's protected communications.

May 2018, Removal of Instructional Duties

We determined, based on a preponderance of the evidence, that on May 3, 2018, [redacted] and [redacted] removed the Complainant's instructional duties.

[redacted] – *Stated Reasons for Removing the Complainant's Instructional Duties*

In a statement [redacted] provided to us prior to our interview of [redacted] in which [redacted] invoked [redacted] right to remain silent, [redacted] stated that [redacted] removed the Complainant's instructor duties because it was discovered that the Complainant had provided unauthorized instruction to students in their CQ phase. [redacted] stated that CQ is an extremely dangerous training evolution, and that only specifically trained and appointed instructors are authorized to instruct in CQ. [redacted] explained that the *Military.com* article prompted the discovery of the *Peak Deliberate Practice.com* blog, which quoted the Complainant as stating that he conducted CQ simulators with students. [redacted] explained that the Complainant's quotes in the *Peak Deliberate Practice.com* article raised concerns regarding the Complainant's teaching techniques. Soon after, a student pilot provided [redacted] with instructional materials the Complainant was providing, and informed [redacted] that the Complainant was performing CQ simulators outside of scheduled syllabus events. [redacted] stated that [redacted] met with the upcoming CQ class and instructed them to see their class advisor if they received training from any VFA-106 IP who was not qualified to teach CQ.

[redacted] – *Timing Between Protected Communications and Removal of the Complainant's Instructional Duties*

[redacted] was aware of the Complainant's participation in the April 2017 PI; became aware that the Complainant had initiated the bottle bets complaints (and subsequent followup communications) in March 2018; became aware that the Complainant assisted in the filing of EO complaints to Senator Warner's office and the USFF EO office (and subsequent followup communications) in April 2018; was aware of the Complainant's April 12, 2018, change request that alleged reprisal and retaliation for making protected communications; and perceived that the Complainant would file additional IG or congressional complaints. [redacted] removed the Complainant's instructional duties on May 3, 2018. The close proximity in time (approximately 3 weeks from the Complainant's April 12, 2018, protected communication as well as [redacted] early May 2018 perception that the Complainant would file another IG complaint) could raise an inference of reprisal.

[redacted] – *Motive to Reprise*

We found [redacted] had motive to reprise against the Complainant, as the Complainant's assistance in the filing of two EO complaints caused [redacted] to be the subject of a USFF EO investigation. Additionally, the Complainant's reporting of bottle bets to the USFF IG, and subsequent elevation of the complaint to Senator Warner's office, as well as the Complainant's April 12, 2018, e-mail describing reprisal and retaliation at VFA-106 for making protected communications, could have reflected negatively on [redacted] ability to command. [redacted] stated that [redacted] discussed the ongoing USFF EO complaint with [redacted], and [redacted] believed [redacted] was frustrated because the Complainant had gone outside the chain of command without talking to leadership, and because the Complainant's statements cast a negative light on VFA-106. [redacted] stated that [redacted] knowledge that the Complainant had participated in filing congressional, EO, and IG complaints caused [redacted] to be "slow to act [initiate any administrative or punitive actions against

the Complainant]," and that [redacted] "under-reacted" to the safety concerns (teaching unapproved and unverified CQ techniques to replacement pilots) related to the Complainant's actions due to concerns the Complainant would file a reprisal complaint. However, [redacted] motive to reprise may have been lessened or overridden by [redacted] safety concerns related to the unknown nature of non-standard instructional material the Complainant was providing to VFA-106 student pilots in areas of training the Complainant was not qualified to instruct, as evidenced by [redacted] April 2018 query of all members of [redacted] leading up to their CQ period about what instruction the Complainant had provided; [redacted] statement that [redacted] did not trust that the Complainant would teach according to the syllabus; and [redacted] May 4, 2018, statements to [redacted] and [redacted] that the Complainant was teaching unapproved and un-vetted techniques that may have contributed to an incident during CQ, and that [redacted] wanted him (the Complainant) to stop.

[redacted] – *Disparate Treatment*

We found insufficient evidence of disparate treatment by [redacted] against the Complainant with respect to the removal of the Complainant's instructional duties. VFA-106 provided data which indicated that from April 2016 through fall 2018, VFA-106 removed the instructional duties of nine other IPs for deviations from standardized procedures, safety of flight concerns, poor performance, or poor judgement. [redacted] explained that multiple scenarios exist that may cause the [redacted] to remove an IP's instructional duties, qualifications, or flight status, such as breeches in flight discipline, disregard for the safety of aircraft or aircrew, lack of knowledge, violations of standard operating publications, personal pressures, legal matters, or lack of trust and confidence. [redacted] explained that once the issue was addressed and remediated, and confidence restored, their duties, qualifications, and flight status were restored. The evidence established that [redacted] removed the Complainant's instructional duties after safety of flight concerns surfaced regarding material the Complainant was providing or teaching to student pilots in an area of training that the Complainant was not qualified to teach.

[redacted] – *Stated Reasons for Removing the Complainant's Instructional Duties*

[redacted] invoked [redacted] right to remain silent, and did not answer questions on this matter.

[redacted] – *Timing Between Protected Communications and Removal of the Complainant's Instruction Duties*

[redacted] was aware of the Complainant's participation in the April 2017 PI, and became aware in March 2018 that the Complainant initiated the bottle bets complaints (and subsequent followup communications); became aware in April 2018 that the Complainant assisted in the filing of EO complaints to Senator Warner's office and the USFF EO office (and subsequent followup communications); and was aware of the Complainant's April 12, 2018, change request e-mail describing reprisal for making protected communications. [redacted] and [redacted] removed the Complainant's instructional duties on May 3, 2018. The close proximity in time (approximately 3 weeks from the Complainant's April 12, 2018,

protected communication and nearly coincident with LtCol Nesbitt's early May 2018 perception that the Complainant would file another IG complaint) could raise an inference of reprisal.

[redacted] – *Motive to Reprise*

We found [redacted] had motive to reprise against the Complainant, as the Complainant's assistance in filing two EO complaints caused an EO investigation that cast VFA-106 in a negative light. Additionally, the Complainant's reporting of bottle bets to the USFF IG, and subsequent elevation of the complaint to Senator Warner's office, as well as the Complainant's April 12, 2018, e-mail describing reprisal and retaliation for making protected communications, could have reflected negatively on [redacted] ability to lead. Lastly, [redacted] stated that after it became known the Complainant had initiated the bottle bets complaints (March 20, 2016), [redacted] told the other junior officers they needed to bring the Complainant "into the fold," and to "fix him," but over time, [redacted] sentiment changed to "stay away from this guy [the Complainant]." However, [redacted] motive to reprise may have been lessened or overridden by his safety concerns related to the unknown nature of non-standard instructional material the Complainant was providing to VFA-106 student pilots in areas of training in which the Complainant was not qualified to instruct, as evidenced by [redacted] May 3, 2018, e-mail to [redacted] that stated, "enough information exists for the command to question [the Complainant's] techniques, procedures and motives, therefore he will remain off the flight schedule in any official capacity in order for the command to gain a clear picture of exactly what is being instructed and to whom."

[redacted] – *Disparate Treatment*

We found insufficient evidence of disparate treatment by [redacted]. VFA-106 provided data which indicated that from April 2016 through fall 2018, VFA-106 removed the instructional duties of nine other IPs for deviations from standardized procedures, safety of flight concerns, poor performance, or poor judgement. As previously described, [redacted] explanations of multiple scenarios to remove an IP's instructional duties, qualifications, or flight status applies here too. The evidence established that [redacted] removed the Complainant's instructional duties after safety of flight concerns surfaced regarding material the Complainant provided to student pilots in an area of training the Complainant was not qualified to teach.

As described above, a preponderance of the evidence established that [redacted] and [redacted] removed the Complainant's instructional duties in response to safety concerns, and their belief the Complainant was teaching non-standard CQ techniques to student pilots. [redacted] and [redacted] had motive to reprise, and believed that any actions they took against the Complainant would likely result in a complaint of reprisal. This belief may have caused [redacted] and [redacted] to be slow to react to the safety concerns, but the circumstantial evidence indicates that:

- the Complainant was not fully qualified to instruct in any phases of training and specifically not qualified to instruct in CQ as the Complainant was not an LSO;
- they believed the Complainant had violated their direction to not instruct in phases for which he was not fully qualified;

- they did not trust the Complainant would teach in accordance with the approved syllabus; and
- they had safety of flight concerns that the material the Complainant had provided to replacement students could potentially lead to an aircraft mishap.

Additionally, we found the evidence supported that VFA-106 took similar actions against IPs who were not whistleblowers, and were otherwise similarly situated. As such, we determined by a preponderance of the evidence that [redacted] and [redacted] did not remove the Complainant's instructional duties in reprisal for his protected communications.

Threatened with Disciplinary Action

We determined, based on a preponderance of the evidence, that on May 7, 2018, [redacted] threatened the Complainant when [redacted] communicated to him that he would either receive an LOI or be subject to a command investigation.

[redacted] *– Stated Reasons for Threatening the Complainant with Disciplinary Action*

[redacted] invoked [redacted] right to remain silent and did not provide testimony or a statement on this topic.

[redacted] *– Timing Between Protected Communications and* [redacted] *Threat of Disciplinary Action*

As previously detailed, [redacted] was aware of the Complainant's protected communications and perceived that the Complainant would file another IG or congressional complaint. The close proximity in time (approximately 3 weeks from the Complainant's April 12, 2018, protected communication, and nearly coincident with [redacted] early May 2018 perception that the Complainant would file another IG complaint) could raise an inference of reprisal.

[redacted] *– Motive to Reprise*

We found that [redacted] had motive to reprise against the Complainant, as the Complainant's assistance in the filing of two EO complaints caused an EO investigation that may have cast VFA-106 in a negative light. Additionally, the Complainant's reporting of bottle bets to the USFF IG, and subsequent elevation of the complaint to Senator Warner's office, and the Complainant's April 12, 2018, e-mail describing reprisal and retaliation for making protected communications could have reflected negatively on [redacted] ability to lead as the [redacted] Lastly, [redacted] stated that after it became known that the Complainant initiated the bottle bets complaints (March 20, 2016), [redacted] told the other junior officers that they needed to bring the Complainant "into the fold," and to "fix him," but over time, [redacted] sentiment changed to "stay away from this guy [the Complainant]."

[redacted] – *Disparate Treatment*

VFA-106 data did not indicate that any of the other instructors that had their instructional duties removed were threatened with, or received an LOI. Additionally, VFA-106 data indicated that VFA-106 conducted 12 CDIs from August 2016 through August 2018; of the 12 CDIs, three involved officers, and one involved allegations of aircraft-related misconduct. Further, there were nine instances of IPs who evidenced deviations from standardized procedures, safety of flight concerns, poor performance, or poor judgement and none of the IPs involved in these instances was subject to a CDI. Therefore, no evidence was provided to support similar actions were taken against personnel who were not whistleblowers, and who were otherwise similarly situated.

Lacking any testimony or statement from [redacted], the strength of the evidence supports that [redacted] had motive and treated the Complainant less favorably than other similarly situated instructors. Therefore, a preponderance of the evidence indicated that [redacted] violated 10 U.S.C. 1034 by reprising against the Complainant for making protected communications when [redacted] threatened the Complainant to accept receipt of an LOI or be subject to a command investigation.

Retaliatory CDI

We determined, based on a preponderance of the evidence, that on May 15, 2018, [redacted] drafted the appointing order that requested the conduct and scope of a VFA-106 CDI; on May 18, 2018, [redacted] initiated the CDI and appointed [redacted] as the IO to conduct the CDI into the Complainant's actions; and [redacted] conducted the CDI from May 18 through July 19, 2018.

[redacted] – *Stated Reasons for Requesting the Conduct and Scope of the CDI*

[redacted] invoked [redacted] right to remain silent and did not provide testimony or a statement on this topic.

[redacted] – *Timing Between Protected Communications and the Request for the Conduct and Scope of the CDI*

As previously detailed, [redacted] was aware of the Complainant's protected communications and perceived that the Complainant would file another IG or congressional complaint. The close proximity in time (approximately 3 weeks from the Complainant's April 12, 2018, protected communication, and nearly coincident with [redacted] early May 2018 perception that the Complainant would file another IG complaint) could raise an inference of reprisal.

[redacted] – *Motive to Reprise*

We found that [redacted] had motive to reprise against the Complainant, as the Complainant's assistance in the filing of two EO complaints caused an EO investigation that may

have cast VFA-106 in a negative light. Additionally, the Complainant's reporting of bottle bets to the USFF IG, and subsequent elevation of the complaint to Senator Warner 's office, and the Complainant's April 12, 2018, e-mail describing reprisal and retaliation for making protected communications could have reflected negatively on [redacted] ability to lead as the [redacted] Furthermore, [redacted] stated that after it became known that the Complainant had initiated the bottle bets complaints (March 20, 2018), [redacted] told the other junior officers they needed to bring the Complainant "into the fold," and to "fix him," but over time, [redacted] sentiment changed to "stay away from this guy [the Complainant]." Lastly, the reasons [redacted] cited in the draft appointment order indicate that the Complainant's protected communications contributed to [redacted] rationale for recommending the conduct and scope for the CDI. [redacted] wrote in the appointing order:

> The misuse of VFA-106 share drive information and deliberate use of false impressions IOT embarrass instructor cadre, create false impressions to former VFA-106 students, and misrepresent facts IRT racial bias within the unit to the media IOT further personal objectives, undermining the chain of command"; "Failure to inform, utilize, and allow the chain of command to address and solve problems"; and "Allowing junior aircrew to be blamed, ridiculed and mistreated after deliberately filing an Inspector General complaint.

[redacted] – *Disparate Treatment*

VFA-106 conducted 12 CDIs from August 2016 through August 2018; of the 12 CDIs, three involved officers and one involved allegations of aircraft-related misconduct. Further, there were nine instances of IPs who evidenced deviations from standardized procedures, safety of flight concerns, poor performance, or poor judgement; however, none of the IPs involved in these instances were subject to a CDI. Therefore, insufficient evidence was provided to support that similar actions were taken against personnel who were not whistleblowers, and who were otherwise similarly situated.

Lacking any testimony or statements from [redacted], the strength of the evidence supports that [redacted] draft appointing order requested the conduct and scope of a retaliatory CDI in reprisal for the Complainant's protected communications, supports an inference of a motive to reprise that is clearly stated by [redacted] cited language contained in the draft appointing order, and, as [redacted]' e-mail to [redacted] stated, "They needed a bullet-proof O-5 [redacted] willing to kamikaze this guy." We determined that "they," more likely than not, referred to [redacted] and [redacted] as they requested the conduct, scope and initiation of the investigation, and, more likely than not, informed [redacted] that the primary purpose of the CDI was to punish and harass the Complainant. As such, we determined by a preponderance of the evidence that [redacted] violated 10 U.S.C. 1034 by requesting the conduct and scope of a CDI for the primary purpose of punishing, harassing, or ostracizing a member of the Armed Forces for making protected communications.

[redacted] – *Stated Reasons for Initiating the CDI*

[redacted], in a prepared statement to us, stated [redacted] initiated the CDI because the Complainant's teaching of non-standard techniques to replacement pilots was a "safety concern"

and "unmitigated risk" for the students, the LSOs, the flight deck crew of the aircraft carrier, and the aircraft itself. [redacted] contacted the CNATRA and CNAL SJAs to ensure the CDI was done via "concrete legal means." As previously discussed, statements the Complainant made in the *Peak Deliberate Practice.com* article caused [redacted] to question what instructions the Complainant provided student pilots for CQ. After reviewing materials the Complainant had distributed to students, [redacted] and [redacted] questioned the Complainant about why the Complainant was teaching in a phase of training (CQ) he was not qualified to teach. According to [redacted], the Complainant responded that he felt he was teaching according to the standard operating procedures. [redacted] stated that [redacted] found the Complainant's response unsatisfactory and that [redacted] now had a significant safety concern as he had an upcoming CQ detachment.

On May 4, 2018, [redacted] and [redacted] met with [redacted] and [redacted], and discussed the Complainant's teaching of non-standard curriculum and potential courses of action. [redacted] advised [redacted] that [redacted] could consider an LOI to start documenting the Complainant's actions, and if [redacted] did not believe an LOI was appropriate, [redacted] should initiate a CDI. [redacted] and [redacted] stated that the purpose of initiating a CDI was to collect evidence, and figure out what the next steps were.

[redacted] – *Timing Between Protected Communications and Initiating the CDI*

As previously detailed, [redacted] was aware of the Complainant's protected communications and perceived that the Complainant would file another IG or congressional complaint. The close proximity in time (approximately 3 weeks from the Complainant's April 12, 2018, protected communication, and nearly coincident with [redacted] early May 2018, perception that the Complainant would file another IG complaint) could raise an inference of reprisal.

[redacted] – *Motive to Reprise*

We found [redacted] had motive to reprise against the Complainant, as the Complainant's assistance in filing two EO complaints caused [redacted] ([redacted]) to be a subject in a USFF EO investigation. Additionally, the Complainant's reporting of bottle bets to the USFF IG, and subsequent elevation of the complaint to Senator Warner's office, and the Complainant's April 12, 2018, e-mail describing reprisal and retaliation for making protected communications could have reflected negatively on [redacted] ability to command. [redacted] stated that [redacted] discussed the ongoing USFF EO complaint with [redacted], and believed [redacted] was frustrated because the Complainant had gone outside the chain of command without first talking to leadership, and because the Complainant's statements cast a negative light on VFA-106. [redacted] stated that [redacted] knowledge that the Complainant participated in filing congressional, EO, and IG complaints caused [redacted] ([redacted]) to be "slow to act," and that [redacted] "under-reacted" to the safety concerns of the Complainant's actions, due to concerns the Complainant would file a reprisal complaint.

[redacted] – *Disparate Treatment*

VFA-106 conducted 12 CDIs from August 2016 through August 2018; of the 12 CDIs, three involved officers and one involved allegations of aircraft-related misconduct. Further, there were nine instances of IPs who evidenced deviations from standardized procedures, safety of flight concerns, poor performance, or poor judgement; however, none of the IPs involved in these instances was subject to a CDI. Therefore, insufficient evidence was provided to support that similar actions were taken against personnel who were not whistleblowers, and who were otherwise similarly situated.

[redacted] invoked [redacted] right to remain silent and did not provide testimony on this matter; however, [redacted] provided us with a statement detailing [redacted] reasons for initiating the VFA-106 CDI. We found [redacted] statement generally consistent with other witness testimony and evidence, with minor deviations in the timeline that did not materially impact the facts. However, we also found that [redacted] statement lacked the following substantive details, including:

- the exact nature of [redacted] discussion with the JAGs to ensure the CDI was conducted via "concrete legal means";
- no information on why [redacted] proposed language in the CDI appointment order related to the Complainant's protected communications; and
- contained no information on the rationale behind selecting [redacted] as the IO. Further, given that [redacted] was aware that [redacted] was the [redacted] and that the Complainant had initiated the bottle bets complaints, [redacted] statement contained no information on specific guidance that [redacted] gave [redacted] to ensure that [redacted] would conduct an unbiased investigation, nor did the statement include any information [redacted] may have exchanged with the JAGs during the CDI to ensure that appropriate oversight of [redacted] action was conducted.

We considered [redacted] consultation with the CNAL and CNATRA JAGs prior to initiating the CDI as a potential affirmative defense under 10 U.S.C. (b)(2)(C), but noted that [redacted] did not fully disclose all relevant information to the JAGs. Specifically, on May 4, 2018, [redacted] disclosed to [redacted] and [redacted] the concerns [redacted] had with the Complainant teaching unauthorized CQ techniques to student pilots, and that it may have contributed to a near mishap [redacted]), but this is inconsistent with [redacted] May 3, 2018, e-mail to [redacted] and [redacted] stating that the overall impression of the PRB was that [redacted] did not attempt to use non-standard CQ landing techniques.

Additionally, the draft appointment order [redacted] sent to the CNAL JAGs requesting their concurrence to initiate the investigation contained multiple references to conducting an investigation into the Complainant's previously described protected communications. Specifically, [redacted] sent [redacted] a draft appointment order that requested an investigation into seven specific items, three of which directly related to the Complainant's protected communications. [redacted] made minor edits to

[redacted] draft (removing two of the matters [redacted] had requested for investigation), and forwarded [redacted] draft appointment order to the JAGs that listed five matters for investigation, two of which related to the Complainant's protected communications, and one of which stated [redacted] wanted to investigate the Complainant's "Failure to inform, utilize, and allow the chain of command to address and solve problems." Moreover, we found no evidence that indicated [redacted] coordinated with, or through the JAGs to ensure that the IO was not biased, and that the IO conducted the investigation in a fair and impartial manner. [redacted] actions indicate an inference of a motive to reprise that is clearly evidenced by [redacted] draft appointment order, and lack of oversight of the investigation. Lastly, as [redacted]' e-mail to [redacted] stated, "They needed a bullet-proof O-5 [redacted] willing to kamikaze this guy." We determined that "they," more likely than not, referred to [redacted] and [redacted], as they requested the conduct, scope, and initiation of the investigation, and, more likely than not, informed [redacted] that the primary purpose of the CDI was to punish and harass the Complainant. As such, we determined by a preponderance of the evidence that [redacted] violated 10 U.S.C. 1034 by initiating the CDI for the primary purpose of punishing, harassing, or ostracizing a member of the Armed Forces for making protected communications.

[redacted] – *Stated Reasons for the Conduct of the CDI*

[redacted] stated that [redacted] asked [redacted] to conduct the CDI because [redacted] was the "logical fit for the investigation based on his expertise," and because [redacted] was an [redacted] and a subject matter expert on carrier landing performance. [redacted] stated [redacted] reviewed the JAGMAN, and that [redacted] did not believe [redacted] approached the investigation with any bias in terms of the facts. [redacted] statement of not approaching the investigation with bias in terms of the facts was contradicted by [redacted] own e-mails. Our review of [redacted] e-mails shows that as the IO for the CDI, [redacted] appeared outcome-driven from the beginning of the investigation to permanently damage the Complainant's career, and shaped the collection of evidence and testimony to justify further administrative action against the Complainant. Specifically:

- on May 21, 2018, [redacted] wrote that "They needed a bullet-proof O-5 willing to kamikaze this guy," and that [redacted] was "looking forward to it in a very weird way";
- on May 24, 2018, [redacted] informed [redacted] that [redacted] believed [redacted] already had enough evidence to justify an FNAEB. Our review of the CDI statements and interviews showed that on May 24, 2018, [redacted] conducted five interviews, two of which were persons to whom [redacted] had provided draft statements to prior to interviewing them, requesting their "backing in case any of this comes up further";
- of the 38 statements [redacted] obtained during the CDI, 22 were from individuals to whom [redacted] had either provided a draft statement to, provided other witness statements to, recommended language to include in their statements, or recommended they consult with specific persons to assist in the drafting of their statements;

- on at least 20 occasions during the course of the investigation, when soliciting statements from personnel, [redacted] disclosed to the interviewees that the Complainant had initiated multiple IG or congressional complaints;
- [redacted] excluded potentially exculpatory statements from persons previously assigned with the Complainant, while including only incriminating statements from other persons affiliated with the Complainant during the same time period;
- [redacted] disparaged the Complainant with other senior naval personnel outside the scope of the final appointing order by highlighting the Complainant's participation in multiple IG and congressional complaints, asking if, based on the Complainant's reputation, they would want him assigned to their squadron, and referring to him as "d-bag [douchebag]"; and
- [redacted] shared details of the CDI with DoD civilian and military personnel and non-DoD personnel who had no "need to know" regarding the details of the investigation.

[redacted] – *Timing Between Protected Communications and the Conduct of the CDI*

[redacted] was aware in January and February 2018 that the Complainant had initiated the bottle bets complaints (and subsequent followup communications), became aware in May 2018 that the Complainant had assisted in the filing of EO complaints to Senator Warner's office and the USFF EO office (and subsequent followup communications), and on May 18, 2018, was aware of the Complainant's April 12, 2018, e-mail discussing reprisal and retaliation for making protected communications. [redacted] conducted the CDI from May 18 through July 19, 2018. The close proximity in time (coincident with the start of the investigation and [redacted] early May 2018 perception that the Complainant would file another IG complaint) could raise an inference of reprisal.

[redacted] – *Motive to Reprise*

A preponderance of the evidence established that [redacted] had motive to reprise and focused the primary purpose of the CDI on punishing and harassing the Complainant after learning the Complainant had initiated the USFF IG bottle bets complaint, and subsequently elevated his complaint to Senator Warner's office. At the time, [redacted] was the [redacted] and senior cognizant USN LSO, and the bottle bets complaint directly called out the LSO community for illegal conduct and unethical practices. [redacted] stated to us that the bottle bets complaints created "anger" in the LSO community, and [redacted] made an impassioned response, writing letters to the CNAL and CNAP staffs. In the letters [redacted] wrote to CNAL and CNAP staff members, [redacted] expressed "... serious concerns for our heritage, our culture, and the death of our warrior ethos if we lend credence to individuals that do not have the character or fortitude to address these issues in person." Immediately after VADM Miller released the message terminating the bottle bets practice, [redacted] e-mailed a draft of a correspondence [redacted] considered sending to senior leadership that stated, "If this is what you value, then we know you no longer value us. And we no longer have confidence and faith in you." On March 6, 2018, [redacted], in an e-mail exchange with a civilian, wrote, "bottle bets are forbidden ... after a malcontent VFA-106 core IP [the Complainant] launched a Navy and

congressional IG on tradition that dates back to straight decks on the Great Lakes. Giant can of worms that I'm considering on how to unleash on the world." When we asked [redacted] to explain the language in [redacted] e-mail, [redacted] stated [redacted] did not remember, that [redacted] viewed this as a matter of principle, and [redacted] did not like "how all this went down." [redacted] explained to us that nobody had ever said anything about bottle bets before, and now it had been elevated to the IG based on the opinion of an individual. [redacted] stated that the Complainant's bottle bets complaints "called out" the LSO community, created animosity, and that [redacted] initial slant toward the CDI was the Complainant was guilty until proven innocent, because he had initiated the bottle bets complaints.

[redacted] – *Disparate Treatment*

We were unable to analyze [redacted] conduct of the CDI for disparate treatment, as [redacted] invoked [redacted] right to remain silent when questioned about [redacted] conduct as the CDI IO.

The strength of the evidence supported that [redacted] conducted the CDI in a retaliatory manner for the primary purpose of harassing, retaliating, and ostracizing the Complainant and to ensure the Complainant would be subject to disciplinary or administrative action. The evidence supported a strong inference of a motive to reprise based on the Complainant's protected communications and, based on [redacted] own words, that he conducted the investigation to "kamikaze" the Complainant. Lastly, no evidence was provided to support that similar actions were taken against persons who were not whistleblowers, and who were otherwise similarly situated. As such, we determined, by a preponderance of the evidence, that [redacted] violated 10 U.S.C. 1034 by conducting a retaliatory investigation for the primary purpose of punishing, harassing, or ostracizing a member of the Armed Forces for making protected communications.

June 5, 2018, Unfavorable FITREP

We determined, based on a preponderance of the evidence, that on June 5, 2018, [redacted] issued the Complainant an unfavorable FITREP in reprisal for the Complainant's protected communications.

[redacted] – *Stated Reasons for Issuing the Complainant an Unfavorable FITREP*

At the time of our interview with [redacted], [redacted] invoked [redacted] right to remain silent and provided no testimony or statements on this topic.

[redacted] – *Timing Between Protected Communications and Issuing the FITREP*

As previously detailed, [redacted] was aware of the Complainant's protected communications and perceived that the Complainant would file another IG or congressional complaint. The close proximity in time (approximately 6 weeks from the Complainant's April 12, 2018, protected communication, and 4 weeks from [redacted] early May 2018

perception that the Complainant would file another IG complaint) could raise an inference of reprisal.

[redacted] – *Motive to Reprise*

We found that [redacted] had motive to reprise against the Complainant, as the Complainant's assistance in filing two EO complaints caused [redacted] to be a subject in a USFF EO investigation. The Complainant's reporting of bottle bets to the USFF IG, subsequent elevation of the complaint to Senator Warner's office, and the Complainant's April 12, 2018, e-mail discussing reprisal and retaliation for making protected communications reflected negatively on [redacted] ability to command. [redacted] stated that [redacted] discussed the ongoing USFF EO complaint with [redacted], and that [redacted] was frustrated because the Complainant had gone outside the chain of command without first talking to leadership, and because the Complainant's statements cast a negative light on VFA-106. [redacted] stated that [redacted] knowledge that the Complainant participated in filing congressional, EO, and IG complaints caused [redacted] to be "slow to act," and that [redacted] "under-reacted" to the safety concerns of the Complainant's actions due to concerns that the Complainant would file a reprisal complaint.

[redacted] – *Disparate Treatment*

The Complainant's three previous FITREPs at VFA-106 included language recommending selection for Operational VFA Department Head (VFA OP DH). [redacted] submitted the Complainant's proposed FITREP covering the period from February 1 through June 25, 2018, with language that recommended the Complainant's selection for VFA OP DH. [redacted] explained that the Complainant's actions (previously described protected communications) and performance did not warrant [redacted] removal of the department head recommendation. [redacted] ranked 42 lieutenants for the period of February 1 through June 25, 2018. Of 42 ranked lieutenants, the Complainant was the only lieutenant to not receive a recommendation for selection to department head, which included 16 lieutenants ranked lower than the Complainant. While the Complainant's trait average increased from 3.86 to 4.00 and his promotion recommendation increased from "Promote" to "Must Promote" from his previous FITREP, unlike the Complainant's previous FITREPs, [redacted] specifically removed the recommendation for the Complainant's selection to a VFA OP DH milestone billet from the proposed FITREP [redacted] had drafted. Lacking the CO's endorsement for selection to VFA OP DH could result in the Complainant failing to screen for his department head milestone tour, which would significantly impact his future promotion potential and viability for future career assignments. Additionally, [redacted] request for [redacted] presence at the Complainant's FITREP debrief was not a normal occurrence, and [redacted] stated that, beginning in April 2018, [redacted] always wanted a witness present when talking with the Complainant. The evidence established that [redacted] treated the Complainant less favorably when compared to similarly situated lieutenants who had not made protected disclosures or were otherwise perceived as being whistleblowers.

As [redacted] provided no justification for issuing the Complainant an unfavorable FITREP, there is insufficient evidence to establish a legitimate reason for issuing an unfavorable

FITREP. A preponderance of the evidence established that a motive to reprise contributed to [redacted] issuing the Complainant an unfavorable FITREP, and the evidence did not support that similar actions were taken against lieutenants who were not whistleblowers, and who were otherwise similarly situated. As such, we determined by a preponderance of the evidence that [redacted] violated 10 U.S.C. 1034 by taking an unfavorable personnel action in reprisal for protected communications.

VII. DISCUSSION

Based on a preponderance of the evidence, [redacted] and [redacted] did not remove the Complainant's instructional duties in reprisal for his protected communications. The evidence established that [redacted] and [redacted] had knowledge of the Complainant's protected communications, and perceived that the Complainant would file additional IG complaints. [redacted] and [redacted] had a motive to reprise against the Complainant based on his protected communications; however, their actions were not driven by retaliatory motive; rather, they acted due to overarching safety concerns related to the unknown nature of non-standard instructional material the Complainant was providing to VFA-106 student pilots in areas of training for which the Complainant was not qualified to instruct. [redacted] and [redacted] took similar actions against IPs who were not whistleblowers, and were otherwise similarly situated. Therefore, we determined that [redacted] and [redacted] would have removed the Complainant's instructional duties absent the Complainant's protected communications, and therefore conclude that the Complainant's instructional duties were not removed in reprisal for his protected communications.

Based on a preponderance of the evidence, [redacted] threatened the Complainant with a personnel action when [redacted] told him he would either receive an LOI, or be subject to a command investigation. [redacted] had knowledge of the Complainant's prior protected communications, and, in close time proximity to issuing [redacted] threat to the Complainant, perceived that the Complainant would initiate additional IG complaints. [redacted] had motive to reprise against the Complainant based on his protected communications, as the Complainant's bottle bets complaints alleged that VFA-106 leadership was complicit in allowing the unethical behavior, and the Complainant's assistance in the filing of multiple EO complaints cast VFA-106 leadership in a negative light. [redacted] specifically directed two IPs to question the Complainant about whether he initiated the bottle bets IG complaint, and to emphasize to the Complainant to use the chain of command to report any grievances. Multiple witnesses stated that the Complainant's protected communications caused VFA-106 leadership to feel "marginalized," which increased [redacted] motive to reprise. [redacted] did not threaten or otherwise issue an LOI or request the conduct of a CDI for any other VFA-106 IPs who evidenced deviations from standardized procedures, safety of flight concerns, poor performance, or poor judgement. Therefore, insufficient evidence was provided to support that similar actions were taken against persons who were not whistleblowers, and who were otherwise similarly situated. Based on a preponderance of the evidence, [redacted] would not have issued the threat absent the Complainant's protected communications, and we therefore conclude that the Complainant was threatened with disciplinary action for his protected communications.

Based on a preponderance of the evidence, [redacted] initiated a retaliatory CDI to punish and harass the Complainant in reprisal for his protected communications. [redacted] had knowledge of the Complainant's protected communications, and perceived the Complainant would file additional IG complaints, which were close in time to when [redacted] initiated the CDI. [redacted] had a motive to reprise against the Complainant based on his protected communications as the Complainant's bottle bets complaints alleged that the VFA-106 leadership was complicit in allowing unethical behavior, and the Complainant's assistance in filing multiple EO complaints cast the VFA-106 leadership in a negative light. [redacted] did not initiate a CDI for any other VFA-106 IPs who evidenced deviations from standardized procedures, safety of flight concerns, poor performance, or poor judgment. Therefore, insufficient evidence was provided to support that similar actions were taken against persons who were not whistleblowers, and who were otherwise similarly situated.

We analyzed the available evidence related to [redacted] interactions with the various JAGs, and considered that [redacted] did not discuss the Complainant's previous protected communications and may have mischaracterized the safety of flight concerns as they related to the Complainant's interactions with [redacted] and the CQ near mishap. After consulting with the JAGs, [redacted] still included language in [redacted] draft appointing order that directly related to the Complainant's protected communications. Lastly, [redacted] e-mail to [redacted] shows that [redacted] believed that [redacted] primary purpose for the CDI was to 'kamikaze [punish, harass, ostracize]" the Complainant. Lastly, we found insufficient evidence that [redacted] exercised any due diligence to ensure the investigation officer was neutral and unbiased, and that the investigation was conducted properly. Based on a preponderance of the evidence, we determined that [redacted] would not have initiated a CDI absent the Complainant's protected communications, and therefore conclude that [redacted] initiated a retaliatory CDI against the Complainant in reprisal for his protected communications.

Based on a preponderance of the evidence, [redacted] requested the conduct and scope of the CDI for the primary purpose of punishing or harassing the Complainant for making protected communications. [redacted] had knowledge of the Complainant's protected communications, and perceived the Complainant would initiate additional IG complaints prior to [redacted] submitting the draft appointment order. [redacted] had motive to reprise against the Complainant based on his protected communications, as the Complainant's bottle bets complaints alleged that VFA-106 leadership was complicit in allowing the unethical behavior, and the Complainant's assistance in the filing of multiple EO complaints cast the VFA-106 leadership in a negative light. [redacted] specifically directed two IPs to question the Complainant about whether he initiated the bottle bets IG complaint, and to emphasize to the Complainant to use the chain of command to report any grievances. Multiple witnesses stated that the Complainant's protected communications caused VFA-106 leadership to feel "marginalized," which shows that [redacted] had a motive to reprise. Further, [redacted] did not request the conduct of a CDI for any other VFA-106 IPs who evidenced deviations from standardized procedures, safety of flight concerns, poor performance, or poor judgement. Therefore, insufficient evidence was provided to support that similar actions were taken against

persons who were not whistleblowers, and who were otherwise similarly situated. [redacted] also included language in his draft appointing order that directly related to the Complainant's protected communications. Lastly, [redacted] e-mail to [redacted] established that [redacted] believed that [redacted] primary purpose for the CDI was to 'kamikaze [punish, harass, ostracize]" the Complainant. Based on a preponderance of the evidence, we determined that [redacted] would not have requested the conduct and scope of a CDI absent the Complainant's protected communications, and therefore conclude that [redacted] requested the conduct and scope of a retaliatory CDI against the Complainant in reprisal for his protected communications.

Based on a preponderance of the evidence, [redacted] conducted a retaliatory CDI for the primary purpose of punishing and harassing the Complainant for making protected communications. [redacted] had knowledge of the Complainant's protected communications, and perceived that the Complainant would initiate additional IG complaints prior to his conduct of the CDI. [redacted] had motive to reprise against the Complainant based on the Complainant's protected communications, as the bottle bets complaints directly called out the LSO community for unethical behavior, and [redacted] admitted [redacted] had an "impassioned response" to the bottle bets complaints. [redacted] acted on this motive when, on March 6, 2018, [redacted] wrote, "... a malcontent VFA-106 core IP launched a Navy and congressional IG on tradition that dates back to straight decks on the Great Lakes. Giant can of worms that I'm considering on how to unleash on the world." [redacted] shaped the conduct of the CDI to ensure further administrative action against the Complainant, by:

- establishing at the onset of the CDI, a goal to "kamikaze" the Complainant;
- determining within 6 days of initiation of the CDI that an FNAEB was appropriate;
- influencing witnesses in the preparation of their statements;
- excluding potential exculpatory information;
- disparaging the Complainant with other senior naval personnel; and
- sharing CDI details with DoD and non-DoD personnel (to include dissemination to private e-mail accounts).

Based on a preponderance of the evidence, we determined that [redacted] would not have conducted a retaliatory CDI absent the Complainant's protected communications, and therefore conclude that [redacted] conducted a retaliatory CDI against the Complainant in reprisal for his protected communications.

Based on a preponderance of the evidence, [redacted] issued the Complainant an unfavorable FITREP for the period from February 1 through June 25, 2018, in reprisal for his protected communications. [redacted] invoked [redacted] right to remain silent, and did not provide a statement detailing the reason he issued the Complainant an unfavorable FITREP. The Complainant's three previous FITREPs all contained recommendations for selection to VFA OP DH. [redacted] was the reporting senior for two of the Complainant's previous FITREPS, and prior to [redacted] becoming aware of the Complainant's protected communications, [redacted] had recommended the Complainant for selection to VFA OP DH. On the June 5, 2018 FITREP, [redacted] recommended selection to VFA OP DH to [redacted];

however, [redacted] removed [redacted] recommendation. [redacted] had knowledge of the Complainant's protected communications, and motive to reprise before [redacted] removed the recommendation and issued the FITREP. Of 42 ranked FITREPs [redacted] issued, the Complainant's FITREP was the only one that did not contain a recommendation for department head, which also included 16 FITREPs ranked lower than the Complainant's. There were no documented counseling actions taken against the Complainant, and the Complainant's FITREP did not include any language that indicated he had performance issues. [redacted] provided no evidence which showed that issuing the Complainant an unfavorable FITREP was based on the Complainant's performance or actions. Based on a preponderance of the evidence, we determined that [redacted] would not have issued the Complainant an unfavorable FITREP absent the Complainant's protected communications, and therefore conclude that [redacted] issued the Complainant an unfavorable FITREP in reprisal for his protected communications.

VIII. RMO RESONSES TO THE TENTATIVE CONCLUSIONS

In [redacted] April 25, 2019, response to our preliminary report of investigation, [redacted] disagreed with our findings and commented that the "Facts, opinions, and conclusions surrounding these events are not necessarily represented as/how [sic] they occurred and any attempt to further clarify would be exceedingly challenging." We carefully considered [redacted] response; however, as [redacted] did not provide any substantive information rebutting the veracity of the findings in the preliminary report of investigation, we did not amend the report or alter our original conclusion.

In [redacted] May 6, 2019, response to our preliminary report of investigation, [redacted] disagreed with our findings and asserted, without providing any details or evidence, that the report contained false statements regarding alleged motive. Additionally, [redacted] stated that the failure to redact [redacted] name from "any and all official documentation is grounds for libel and will result in legal action against the [O]ffice of the Inspector General and all individuals responsible for said documentation."

[redacted] stated that the "motive and basis" for the CDI was due to the safety concern regarding the unauthorized CQ material the Complainant had provided to replacement pilots and that, due to the Complainant's tendency to use complaint systems, command leadership chose to utilize the counsel of the SJA (CNAL) on the proper way to proceed while simultaneously protecting the Complainant's whistleblower status. We stand by our conclusions in the report, noting that this report detailed that [redacted] discussed Complainant's actions with the CNAL SJA, and that the CNAL SJA recommended an investigation into the Complainant's actions (providing unauthorized CQ training material to replacement pilots). However, [redacted] provided no countervailing evidence to explain:

- Why, after discussing the issues with the SJA, [redacted] elected to include language in the subsequent draft appointment order that referenced investigating actions related to the Complainant's previous protected communications?
- Why [redacted] selected [redacted], the former head of the LSO School, as the investigating officer, given that the Complainant's bottle bets IG/Congressional communications impugned the actions of the LSO community?

- What detailed direction or guidance [redacted] provided to [redacted] to ensure that [redacted] was not biased and could conduct a fair and impartial investigation?
- Why [redacted] did not exercise adequate oversight of [redacted] actions during the investigation to ensure that [redacted] did not deviate from the scope of the appointing order and did not disparage the Complainant during the investigation process?

Additionally, [redacted] stated that [redacted] removed the VFA operational department head (VFA OP DH) recommendation from the Complainant's FITREP because the Complainant "lacked the sense of urgency to get his instructor qualifications in a timely manner … and when given a tailored opportunity to progress, he failed." [redacted] also stated that the FITREP contained a positive trait average increase (3.86 to 4.00, and Promote to Must Promote) to ensure the Complainant's career progression would not be damaged. We stand by our conclusions in the report, noting that this report detailed the Complainant's trait average was favorably increased from 3.86 to 4.00. However, in order to achieve the trait average increase, the Complainant's previous FITREP (period of performance February 1, 2017 through January, 31, 2018) block 39, "Tactical Performance" trait was increased from 3.0 to 4.0. One of the elements of the "Tactical Performance" trait relates to the ability to attain qualifications as required and expected. Specifically, a 3.0 in "Tactical Performance" indicates the service member meets the standard of attaining their qualifications as required and expected. A 4.0 in "Tactical Performance" indicates the service member's performance is above the standard for attaining their qualifications. [redacted] stated reason that [redacted] removed [redacted] VFA OP DH recommendation because the Complainant lacked a sense of urgency to get his instructor qualifications is inconsistent with the trait grade [redacted] assigned the Complainant. Additionally, [redacted] stated that [redacted] had removed recommendations from other service members, when appropriate, but failed to provide any substantive evidence such that we could verify the veracity of [redacted] assertion.

In [redacted] May 22, 2019, response to our preliminary report of investigation, [redacted] disagreed with our findings and asserted that, "No other factors or complaints that [the Complainant] was involved with had any bearing on the investigation that I conducted." [redacted] stated that he conducted a thorough and fair investigation and that the DoD OIG investigation was deficient because it:

- Failed to take into account the merits of the VFA-106 CDI;
- Asserted without merit that CDR Roberts manipulated witness statements; and
- Misrepresented or excluded key evidence that exonerated him.

The DoD OIG considered all of the evidence and we stand by our characterization of [redacted] conduct of the CDI and the conclusion in our report. The purpose of the DoD OIG investigation was not to review the merits and conclusions of the VFA-106 CDI. Rather, the purpose of the DoD OIG investigation was to ascertain the facts and evidence surrounding the manner in which [redacted] conducted the VFA-106 CDI, and whether the facts and evidence indicate the primary purpose of the conduct of the VFA-106 CDI was to punish or harass the Complainant in reprisal for making protected communications. [redacted] admits that [redacted] sent a draft statement to witnesses, but alleged that it was only for

format purposes, and without the intent to influence any witness statements. In [redacted] TCL response, [redacted] did not address the multiple instances of [redacted]

- sending previous witness statements to new witnesses;
- recommending witnesses coordinate with other witnesses in the preparation of their statements;
- recommending witnesses include language in their statements that "helps me substantiate," "…makes my case," "…lends further credence" to [redacted] recommendations, "…substantiate prior existing pattern of behavior," and "…prove my point";
- requesting multiple "offline" conversations with senior naval personnel in positions that could influence the Complainant's career or future assignments to discuss their awareness of the Complainant's reputation, or whether they would want him assigned to their squadron; and
- widely disseminating FOUO CDI details or evidence to military, DoN civilian, and non-DoD personnel who had no need to know.

[redacted] further asserted that the DoD OIG mischaracterized several e-mails in the preliminary report of investigation. In the one example detailed in [redacted] response to our tentative conclusions, [redacted] asserted we cited an e-mail [redacted] claimed was never sent to anyone but [redacted] that indicated an impassioned response to CNAL's draft message concerning bottle bets. E-mail evidence clearly established that [redacted] sent the e-mail in question from [redacted] NMCI account at 5:00 p.m. on February 8, 2018, to [redacted], USN, CNAP [redacted], [redacted], and [redacted], USN, [redacted].

Lastly, [redacted] asserted that the e-mail [redacted] sent to [redacted] that contained the language, "They needed a bullet-proof O-5 [redacted]] willing to kamikaze this guy," and that [redacted] was "looking forward to it in a very weird way," was just an "irreverent joke" and nebulous choice of words that had no meaning. [redacted] stated that "by saying kind of looking forward to it, [redacted] was referring to the challenge of taking on a difficult investigation given that [redacted] had limited official duties while preparing for retirement." This statement is incongruent with [redacted] sworn testimony to us where, under oath, [redacted] stated that [redacted] did not want to "take this [the VFA-106 CDI] on," and that "I [redacted]] was really at that point I was hoping to hone my golf game and make sure I got my jobs lined up for outside the Navy." Additionally, a plain reading of the e-mail sent to [redacted] does not support [redacted] TCL response. Rather, a plain reading of the e-mail indicates that [redacted] was looking forward to [redacted] opportunity to "kamikaze this guy [the Complainant]."

After carefully considering [redacted], [redacted], and [redacted] responses to our tentative conclusions and their supplemental evidence, which did not provide any information that we had not already considered, we stand by our conclusions.

IX. CONCLUSION(S)

We conclude, by a preponderance of the evidence, that:

[redacted] and [redacted] did not remove the Complainant's instructional duties in reprisal for his protected communications;

[redacted] threatened the Complainant with disciplinary or corrective action in reprisal for his protected communications;

[redacted] initiated a retaliatory CDI against the Complainant in reprisal for his protected communications;

[redacted] requested the conduct and scope of a retaliatory CDI against the Complainant in reprisal for his protected communications;

[redacted] conducted a retaliatory CDI against the Complainant in reprisal for his protected communications; and

[redacted] issued the Complainant an unfavorable FITREP in reprisal for his protected communications.

X. RECOMMENDATIONS

We recommend the Secretary of the Navy review the Complainant's Official Military Personnel File to remedy any harm to the Complainant's promotion potential or career as a result of the actions of [redacted], [redacted], and [redacted].

We also recommend the Secretary of Navy take appropriate action against [redacted], [redacted], and [redacted] for reprising against the Complainant.

Appendix A

Statements Provided for VFA-106 Investigation

Name	Type	Date	Name	Type	Date
[redacted]	SME	31 MAY	[redacted]	STMT	25 JUN
[redacted]	SME	1 JUN	[redacted]	STMT	25 JUN
[redacted]	SME	3 JUN	[redacted]	STMT	25 JUN
[redacted]	SME	5 JUN	[redacted]	SME	25 JUN
[redacted]	STMT	6 JUN	[redacted]	STMT	26 JUN
[redacted]	STMT	6 JUN	[redacted]	STMT	26 JUN
[redacted]	STMT	7 JUN	[redacted]	STMT	26 JUN
[redacted]	SME	7 JUN	[redacted]	STMT	26 JUN
[redacted]	STMT	9 JUN	[redacted]	STMT	27 JUN
[redacted]	STMT	11 JUN	[redacted]	STMT	27 JUN
[redacted]	STMT	14 JUN	[redacted]	STMT	27 JUN
[redacted]	STMT	14 JUN	[redacted]	STMT	28 JUN
[redacted]	STMT	15 JUN	[redacted]	STMT	28 JUN
[redacted]	STMT	15 JUN	[redacted]	STMT	28 JUN
[redacted]	STMT	18JUN	[redacted]	STMT	28 JUN
[redacted]	STMT	21JUN	[redacted]	SME	29 JUN
[redacted]	STMT	21 JUN	[redacted]	STMT	29 JUN
[redacted]	STMT	25 JUN	[redacted]	STMT	3 JUL
[redacted]	STMT	25 JUN	[redacted]	SME	10 JUL

* Items in yellow indicate personnel to whom [redacted] sent draft statements, the LSO recommendation document, previously submitted statements of other personnel, recommended including specific language to, or who coordinated with other personnel in drafting their statement.

Interviews Conducted for VFA-106 Investigation

Name	Date	Name	Date	Name	Date
[redacted]	22 MAY	[redacted]	6 JUN	[redacted]	12 JUN
[redacted]	22 MAY	[redacted]	6 JUN	[redacted]	12 JUN
[redacted]	23 MAY	[redacted]	7 JUN	[redacted]	13 JUN
[redacted]	24 MAY	[redacted]	7 JUN	[redacted]	14 JUN
[redacted]	24 MAY	[redacted]	8 JUN	[redacted]	15 JUN
[redacted]	29 MAY	[redacted]	9 JUN	[redacted]	19 JUN
[redacted]	29 MAY	[redacted]	11 JUN	[redacted]	20 JUN
[redacted]	30 MAY	[redacted]	11 JUN	[redacted]	23 JUN
[redacted]	30 MAY	[redacted]	11 JUN	[redacted]	25 JUN
[redacted]	31 MAY	[redacted]	11 JUN	[redacted]	26 JUN
[redacted]	31 MAY	[redacted]	11 JUN	[redacted]	26 JUN
[redacted]	31 MAY	[redacted]	11 JUN	[redacted]	26 JUN
[redacted]	4 JUN	[redacted]	11 JUN	[redacted]	27 JUN
[redacted]	5 JUN	[redacted]	11 JUN	[redacted]	12 JUL
[redacted]	5 JUN	[redacted]	11 JUN	[redacted]	12 JUL
[redacted]	5 JUN	[redacted]	11 JUN	[redacted]	12 JUL
[redacted]	6 JUN	[redacted]	11 JUN		
[redacted]	6 JUN	[redacted]	11 JUN		

* Items in yellow indicate personnel [redacted] had substantive conversations with, or provided the LSO recommendation document to, prior to their interviews.

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